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PREFACE

The desirability of placing actual cases on Company Law before law students was the motive for this collection.

Neither the limits assigned nor the time available permitted an exhaustive selection of cases. Those chosen are all known to the active practitioner but it is hoped that the student may derive benefit from the study of the discussions submitted.

The Introduction is presented with a like remark.

Acknowledgment must be made of the kind courtesy in permitting the use of the Reports of their respective series for this purpose, of the Incorporated Council of Law Reporting for England and Wales, the Proprietors of The Law Journal Reports and the Proprietors of The Times Law Reports.

H. A. Robson,
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Winnipeg,
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Cases on Company Law

INTRODUCTION.

A word may be said about the form of incorporation of joint stock companies in different jurisdictions. The English system of registration followed in some of our provinces differs in effect from that of incorporation by charter. The results flowing from this difference in method may be important. It is not likely that companies of the latter class take the attributes of companies incorporated by royal charter. They are, no doubt, parliamentary creations such as are described by Bowen, L.J., in *Baroness Wenlock* v. *River Dee Company* (*infra*, p. 214), and restricted accordingly. In the system of incorporation by registration that process is ministerial, and *mandamus* lies to compel registration. Questions as to the right to register are dealt with in that way. But where the act is that of the Executive Government, as in the Letters Patent system, it is obvious that there is no such means of insisting on incorporation.

In re The Massey Manufacturing Company (1), was a case of an application for a *mandamus* to compel the Provincial Secretary to sign an advertisement in the form of a public notice, necessary under the Ontario Companies Act, to the increase of capital stock.

The question of ministerial duty or executive act under the Statute, as it then stood, was thus instructively dealt with by Osler, J.A., one of the majority of the Court, which took that view:

"It will be sufficient to refer to two or three of the authorities upon this point.

"In the *Queen* v. *The Lords Commissioners of the Treasury* (2), a rule was granted upon the Lords of the Treasury to shew cause why a *mandamus* should not issue, commanding them to issue a treasury minute to the paymaster of civil contingencies, directing him to pay to the treasurer of the County of Lancaster certain sums specified in a schedule, being costs which had been taxed by the county officers in the criminal law accounts of the county.

(1) 13 Ont. App. Rep. 446. (2) L. R. 7 Q. B. 388.

"The rule was opposed on the ground that the Lords of the Treasury in paying these accounts were acting for the Crown in paying out and distributing the public money.

"In argument Jessel, Solicitor-General, conceded 'that where the Legislature has constituted the Lords of the Treasury agents to do a particular act, in that case *mandamus* might lie against them as mere individuals designated to do the act.'

"In giving judgment COCKBURN, C.J., said:

'When a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction.'

"BLACKBURN, J., says:

'The question remains whether there is any statutable obligation cast upon the Lords of the Treasury to do what we are asked to compel them to do by *mandamus*, because it seems to me clear that we ought to grant a *mandamus*, if there is such a statutable obligation, particularly where the application is made on behalf of persons who have a direct interest in the matter. But it is here, I think, that the case fails.

'The general principle, not merely applicable to *mandamus*, but running through all the law is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant, as long as he is merely acting as servant. It seems to me that the obligation such as it is, is upon Her Majesty to be discharged through her servants, and you cannot proceed therefore against the servants.'

"The same distinction was adverted to in the *Queen* v. *The Commissioners of Inland Revenue, Ex parte Nathan* (3), which was a motion for a *mandamus* to compel the defendants to repay a portion of a sum which had been paid by the prosecutor for probate duty. It was held that the right of the prosecutor was a right against the Crown in respect of moneys which were in the hands of the Crown, and belonged to the Crown; and for that reason as well as because there was specific remedy by means of a petition of right, and thus to obtain payment of what was in its nature a merely money demand, *mandamus* would not lie.

"In the American Courts the question has been frequently raised, and was very fully considered in *The State of Mississippi*

(3) 12 Q. B. D. 461.

v. *Johnson* (4), a case which appears to be quite in line with the English authorities. Distinguishing between executive and ministerial duty, the Chief Justice says:

'A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple definite duty arising under conditions admitted or proved to exist, and imposed by law.'

"In the case before us, I think, the Court below have properly held that the act which the Provincial Secretary is required to do, is not of an executive nature, but is purely ministerial in its character."

In case it should transpire that there has been impropriety preceding the official act creating the corporation, there are likewise differences of remedy. Of a company registered as a result of what was considered an abuse of the law (*i.e.*, foreigners seeking incorporation in England, for wholly foreign and somewhat mysterious purposes), it was said in *Princess of Reuss* v. *Bos* (5), by Lord Hatherley, L.C.: * * * "All we have to ask ourselves is this: Has the company come into existence,—has it been born? If it has been born, I think, with regard to the second question, there can be no doubt that it ought to be as speedily as possible extinguished.

"The question is, therefore, simply whether it has been created. If created, there is no power given in the Act of Parliament, nor in any other Act of Parliament that I am aware of, by which, through any operation of a formal application, like an application by *scire facias* to repeal a charter, the company can be got rid of, unless it can be got rid of by being extinguished by the sections of the Act of Parliament which provide for the winding up of companies when they ought, from any circumstances whatever, to be wound up. But your Lordships will remember that under section 79, sub-section 5, in addition to the other causes for which a company may be wound up, it may be wound up when the Court shall for any reason think it just and proper that it should be so wound up; that question as to its being just and proper, having reference, of course, to what is just and proper in a judicial point of view, regard being had to all the circumstances of the case," and by Lord Cairns * * * "My Lords, it might have been a very wise provision of the Legislature to have said that in a case of that kind,—a case where there was an abuse of the Act of

(4) 4 Wall. 475, 498. (5) L. R. 5 H. L. 176.

Parliament going on, a case where, if it had been a matter of royal grant, there would have been what is termed a forfeiture of the franchise by reason of non-user or mis-user, it might have been a very wise thing for the Legislature to have said in a case of that kind, there ought to be some summary peremptory mode of reducing or getting rid of the incorporation, and putting an end to a state of things, which is an abuse of, or a fraud upon the Act of Parliament, and which ought not to be allowed to continue. However, the Legislature has not thought fit to provide any means in the nature of a process of reduction in the ordinary sense of the term, for getting rid of a corporation in any such circumstances. But it appears to me the Legislature has given powers under this very Act of Parliament, quite large enough to deal with such a case, whether it was absolutely in the mind of those who framed these powers or not. I refer to the section which has been mentioned, which defines the circumstances under which a company ought to be wound up, or may be wound up."

So that it was held that winding up was the remedy in such cases. Statutes providing for the incorporation of companies by letters patent in some instances provide for revocation in case of such miscarriage. In the absence of such provision the *scire facias* remedy would doubtless be available, and in all cases the usual winding up practice would be open under the "just and equitable" clause referred to in the *Princess of Reuss* case.

Once the letters patent have been executed, or the registration has taken place even erroneously, the company exists until the appropriate measure of redress has been taken: *Glover* v. *Giles* (6), was an attack on the incorporation. Fry, J., said * * * "In my view, I have no power to inquire into that at all, and I cannot declare the incorporation to be void. The incorporation of persons into bodies corporate is a prerogative of the Crown, and, although in this case the prerogative is exercised under certain statutory provisions, the incorporation is none the less an exercise of the prerogative. There is a perfectly well-known method by which an incorporation may be recalled or made void. Moreover, it is competent to proceed by *quo warranto,* and to shew that persons who represent themselves as members or officers of a corporation are not so. But it is quite new to me to hear that some of the individual corporators of a corporation can come to this Court and ask to have it declared, as against other members of the corporation, that the incorporation was obtained by fraud, or irregularity."

(6) L. R. 18 Ch. D. 173.

The English Companies Act provided that a certificate of incorporation given by the registrar should be conclusive evidence that all the requisitions of the Companies Act in respect of registration had been complied with.

A similar provision is to be found in most, if not all, of the Provincial Acts, which have adopted the registration method.

The English Act standing as above there arose *Peel's Case* (7). where the memorandum of association had, after signature, been altered by the erasure of a statement of a very general object of the company, and the memorandum had been received, and the company registered without the assent of the subscribers being obtained to the alteration. It was on this contended that the company was never legally formed. Lord Justice Cairns in the course of his judgment said:

"But then the Act of Parliament says to any such allegation, the certificate of incorporation given by the Registrar is conclusive, and not merely a *prima facie* answer. Therefore, as it seems to me, entirely admitting the accuracy of all the facts which Mr. Peel alleges, about which indeed there seems to be no dispute, the Act of Parliament says they are all to be answered by the production of a certificate of incorporation given by the Registrar; and, as it seems to me, not only is that the express provision of the Act of Parliament, but one can see that there is sufficient reason for such a wise provision. Parliament requires for obvious purposes of public policy, at the origin of a company of this description, that it should begin with seven or more persons subscribing a memorandum, which is to be registered, and that this should be for the purpose of public policy held over the person who originally commenced the company; but then, when once the memorandum is registered, and when once the company is held out to the world as a company undertaking business, willing to receive shareholders, and ready to contract engagements, then it would, of course, be a very disastrous consequence if, after all that had been done, any person was allowed to go back and enter into an examination (it might be years after the company commenced), of the circumstances attending the original registration, and the regularity of the execution of the documents originally received by the Registrar. The Registrar if he performs his duty carefully, will be the guardian of the public interest by seeing that the memorandum is properly executed, and properly brought for registration; but, whether he does so or not, particularly after the certificate of

(7) 36 L. J. Ch. 757.

incorporation is given, nothing is to be inquired into as to the regularity of the prior proceedings. Of course, that is quite consistent with the persons who were parties to the original memorandum and executed it leaving entirely intact any right which they may be advised they have against the Registrar or any other persons if a document executed by them in one form comes afterwards to be registered in another form, the alteration having been made without their sanction. It is not necessary to express any opinion here if any wrong has been done by the mode in which the registration took place, or whether the legal rights of the parties do or do not remain entire, notwithstanding the 18th section of the Act of Parliament. I think, therefore, on this ground, which was not argued in the Court below, but was argued before myself and the late Lord Justice, the case of Mr. Peel to have his name taken off the list fails."

In the House of Lords, in the case of *Oakes* v. *Turquand* (8), Lord Chelmsford, L.C., said: "I think the certificate prevents all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case that all previous requisites had been complied with." Lord Cranworth made a similar remark. As against these, consider the case of *In re National Debenture and Assets Corporation* (9), where the objection taken was that there was not in fact seven persons signing the memorandum. Bowen, L,J., at p. 519, is reported thus:—

"The certificate of the Registrar cannot cure a fatal blot which is caused by a smaller number of persons purporting to form a corporate body than the Act of Parliament requires. That is clear by the language of section 6 and section 18 of the Act of 1862. Section 6 provides that seven or more persons may form a company. How? By subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act. It does not say less persons than seven will do. What does it mean by the seven persons complying with the requisitions of the Act? It means that they are to do that which is prescribed by sections 17 and 18. Section 18 says, "A certificate * * * shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." Amongst others there is the requisition that the seven persons shall subscribe their names. It does not say that less than seven persons can do it. It seems to me, therefore, that the learned Judge

(8) L. R. 2 H. L. 325. (9) 1891, 2 Ch. 505.

was perfectly right in his view of the law. But when we find a memorandum of association signed by seven persons, it lies on those who wish to say it is not signed by seven persons to prove it. Whatever the cloud may be that hangs over the origin of this company, I do not think that the burden of proof has been shifted, or that there is evidence on which we can safely act to the effect that there are not seven persons here who signed the memorandum of association by themselves, or by somebody authorized to sign it for them."

And Lindley, L.J. and Kay, L.J., held a like view.

The case went off on evidence which led to the presumption that there were in fact seven signatories, and strictly, therefore, the above opinion of Bowen, L.J., and the opinions of the other Lord Justices were not necessary to the decision though Vaughan Williams, J., treats the matter as a decision in delivering judgment *In re Laxon & Co.* (10), where he comments fully on the divergences of opinion above indicated.

In 1900 the English Acts were altered so as to provide that the certificate of the Registrar should be conclusive evidence that all the requisitions of the Companies Act in respect of registration and of matters precedent and incidental thereto had been complied with, and that the association is a company authorized to be registered, and duly registered under the Companies Acts. And it is now thought that this amendment largely, if not wholly, removes the doubts arising from the differing judicial expressions.

But unless the wide statutory estoppel, brought about by this amendment in England, is also found to exist in our Provincial legislation, the situation would be as it was in England before that amendment.

The impression had been gathered, perhaps erroneously, that the case of *Princess of Reuss* v. *Bos* (*supra,* p. 3), had decided that companies dominated by aliens, and in fact without engaging in local objects, should not be permitted to continue in existence under the Companies Acts.

In re Capital Fire Insurance Association (11), was a case where though the company had commenced business abroad, it had not within a year, as contemplated by the statute, commenced business in England, but Chitty, J., found there was still a *bona fide* intention to commence business there, and declined to order the winding-up of the company.

(10) 1892, 3 Ch. 555. (11) 21 Ch. D. 209.

Provincial Acts authorizing incorporation by charter require proof that the applicants are over twenty-one years of age. The effect of some of the signatories to a memorandum of association being infants is dealt with by Vaughan Williams, J., in *Re Laxon & Co.* (*supra,* p. 7), as follows:—

"It is admitted that eight persons purported to sign; but it is said that two out of the eight persons were infants, and that the signatures of these two persons do not bind them. It is said also that in May of this very year Mr. Justice Stirling made an order avoiding the contract entered into by those infants by reason of their having signed the memorandum of association.

"But, as I understand, the contract of an infant is only a voidable contract. It is a valid contract until it is rescinded, and it was admitted in the course of the argument that if nothing had happened—if no order had been made, and these infants had not repudiated their contract, but on attaining their majority had assented to it—thereupon the incorporation of the company would have been valid, and section 6 of the Companies Act, 1862, would have been complied with, because seven persons would have subscribed their names to the memorandum of association. The effect of that is to shew that an infant at the time of signing is a 'person' within the meaning of that section. It is quite true that he may afterwards avoid the contract which arises on his signature; but it seems to me that, unless and until he does so, he is a 'person,' and that, therefore, the objection to this registration fails."

Company law resembles many other branches of our law in that, while there are varying statutory provisions, no two legislative jurisdictions having exactly the same, still there underlies each the same solid body of general principles as expressed in a thoroughly matured jurisprudence. The differences in the organic provisions and in the details of regulation are easy to grasp, and the student in any one jurisdiction need have no difficulty in acquiring the main features of the other statutory codes on the subject. It is in fact essential that before applying a case from another jurisdiction there should be a careful examination of the bearing of possibly different statutory provisions.

In some jurisdictions there have been statutory departures from certain principles enunciated in House of Lords or Privy Council cases. For instance in Manitoba there may under conditions be sales of shares at a discount, and likewise shares in other companies may be acquired.

In the main, and aside from distinctions in mode of organization already mentioned, the chief difference between the English Acts and those following them and the provisions of certain Canadian and Provincial Acts is in the system of government by articles of association and special resolutions in the former as against the by-law method in the latter.

One word of explanation may be permitted here. It has not been possible within these limits to cover every phase of this wide subject. It is hoped that a perusal of the selected judgments will expose a view broader in comprehension than would be indicated merely by the topic under which the case is usually cited. The disquisitions of learned Judges are more illuminating than a text writer's epitomes. It is to be said that many of the cases are not the fundamental ones on the particular subject. Economy of space has led to the inclusion of cases, of course authoritative, but repetitive of basic principles previously settled. And this because the cases used are for this purpose fuller in material. They tell more in fewer words. They faithfully state the principle and indicate its origin, that is to say, the leading case. For instance the case of *In re Scottish Petroleum Company* (12), *infra,* p. 48. That case besides dealing with a question of capacity of directors, and the right to repudiate a contract, and the time of the exercise of that right, gives the rules in *Oakes* v. *Turquand* (8), as to the effect of the intervention of winding-up proceedings in such case before the repudiation. So that in such instances the student by means of the cases used will get the leading cases. It is not merely the selected cases that he is to learn, but the cases referred to in them, and which form their foundation. To some extent, as the cases cover varying points, accuracy of classification has not been attainable. It is hoped that in the small circumference of these pages there will be found a presentation of judicial expression which will enable students to acquire a fair understanding of this important branch of mercantile law.

(12) L. R. 23 Ch. D. 413.

Obligation of Subscribers, Memorandum of Incorporation.

In re THE LONDON HAMBURGH AND CONTINENTAL EXCHANGE BANK (Limited) (EVANS'S CASE.)

1867, 36 L. J. Ch. 501.

THE COURT OF CHANCERY.

The company called the London, Hamburgh and Continental Exchange Bank (Limited) was established, in 1863, with a capital divided into 10,000 shares. Evans having been requested to allow his name to be used in the promotion, consented to do so, and signed the memorandum of association as agreeing to take ten shares. He alleged, however, that it was upon the understanding that he was to be under no liability in respect of such shares. It appeared that he attended certain meetings of the provisional directors, of whom he, as a subscriber of the memorandum of association was one, which took place prior to the 19th of June, 1863, when new directors were appointed, of whom he was not one.

On the 10th of July, 1863, a meeting of the directors was held, when it was resolved that 5,000 shares only should be first issued; and 3,645 shares having been subscribed for in London, 3,500 were then allotted in London, the remaining 1,500 being reserved for allotment in Hamburgh.

On the 2nd of September, 1863, at another meeting of the directors, the 1,500 shares so reserved were allotted to persons in Hamburgh. It was then resolved that arrangements should be made for issuing the second set of 5,000 shares.

At a general meeting of the company on the 21st of April, 1864, the directors were, by a resolution, authorized to issue the second set of 5,000 shares in such manner as should be most conducive to the interests of the company.

At a meeting of the directors on the 18th of May, 1864, it was resolved that these 5,000 shares should be issued as follows: 500 shares to a Mr. Preston, 500 shares to a Mr. Henry, and 4,000 shares to the nominees of a Mr. Fletcher, subject to confirmation on the following 23rd of May.

This last allotment of 4,000 shares was not confirmed, and nothing more was ever done with reference to allotment of shares.

The company continued to transact business for about eighteen months, and paid one dividend. It was ordered to be wound up on the 22nd of April, 1865.

No shares were on any of the above-mentioned occasions allotted to Mr. Evans. He never, after the appointment of new directors, took any part in the affairs of the company; he paid no calls, and did not receive the dividend. The official liquidator having placed him upon the list of contributories, the Master of the Rolls held that he was rightly so placed; from which decision he now appealed.

Lord Justice Turner:—Mr. Evans, the appellant in this case, subscribed the memorandum of association of this company, and became one of the first directors of the company; it was therefore his first duty to place himself upon the register of members in accordance with the provisions of the 23rd section of the Companies Act, 1862. This, however, he neglected to do; he soon ceased to be a director, and took no further steps with reference to his position in this company. Can he take advantage of his own neglect to do that which he was bound to do? It is said that he might have rid himself of liability by having shares allotted to him, and then immediately transferring them to some other person, and that his not taking any shares amounted to the same thing. Whether he might have so acted or not, I do not express any opinion; but the course which was taken had not, I think, the effect of relieving him from the responsibility arising from his having signed the memorandum of association. It is next said that all the shares were allotted to others, and consequently that no shares could have been allotted to him. If this had been so, some question might have arisen; but I find that up to the time of the order to wind up, there were at least 4,000 shares which had never been allotted. The order appealed from is, I think, right.

Lord Justice Cairns:—I regret, so far as it is proper to regret, the decision to which I must arrive, because I must consider that the appellant acted *bona fide;* he appears to have thought that on leaving the company on the 10th of July, 1863, he had really ceased to have connexion with it, and he has not taken any advantage from his position. Enactments, however, must be strictly pursued. Original subscribers to articles of association are by the act deemed to have agreed to take shares. That agreement constitutes assets of the company, which cannot be parted with without the consent of the company. The persons who ought to act upon that section are the directors. Mr. Evans was one; it was then his duty to enter his name upon the register of shareholders; once entered there, he could

only be released by transfer of the shares, and the substitution of some other person. Nothing of the kind was done here. It is said that the shares were, in fact, allotted to some other persons. What we find, however, to be the case is, that there were always shares which could have sufficed for the allotment of these shares. The motion must be dismissed, with costs.

Obligation of Subscribers to Memorandum of Incorporation.

In re TAL Y DRWS SLATE COMPANY, MACKLEY'S CASE.

1875, L. R. 1 Ch. D. 247.

MALINS, V.C.

This was a summons to remove the name of Mrs. Amelia Mackley from the list of contributories of the Tal y Drws Slate Company, Limited, she having been placed on the list for fifty shares as the executrix of her late husband, Thomas Cole Mackley.

The company was formed in the year 1863, under the Companies Act, 1862, by the registration of a memorandum and articles of association, Mr. Mackley having subscribed the former for fifty shares. He had been induced to take this step by being informed by the promoter of the company that an intimate friend of his had promised to become a director, and finding that this information was incorrect, he had at once requested that his name might be withdrawn from the company, but took no active steps with this object.

He never took any part in the management of the company, and the whole of the share capital was allotted to other persons, and there were no shares which could have been put in his name. No steps were ever taken to put his name on the register of members, and he never paid any deposit or calls on any shares in the company.

The shares were of £10 each. The company continued to exist for some years, and on the 18th of March, 1868, eighty-nine shares were forfeited for non-payment of calls. These shares had been partially paid up. They were never re-allotted. Calls had been made from time to time for the full nominal amount of the shares, and all except the eighty-nine forfeited shares were paid up in full.

Mr. Mackley died on the 6th of July, 1869, leaving his widow, the present applicant, his executrix, and the company ultimately

went into voluntary liquidation, and on the 24th of April, 1871, the liquidation was ordered to be continued under the supervision of the Court. The liquidator then placed Mrs. Mackley on the list as Mr. Mackley's executrix, in respect of the fifty shares for which he had subscribed the memorandum of association, and the present summons was taken out for the purpose of having her name removed from the list.

MALINS, V.C., after referring to the facts of the case, continued:—

Considering that, except by the signatures to the memorandum of association, Mr. Mackley's name was never connected with the company, and that he was never on the register of shareholders, it is quite clear that no one could ever associate him with it in any way. No creditor could ever have given any credit to the company on the faith of his name. It is also impossible that the shareholders *inter se* could have any right to call upon Mr. Mackley to contribute towards paying the debts.

Then it is said that once having signed the memorandum he is liable for the shares for which he has signed, and cannot escape from the liability except by accepting the shares and having them formally transferred. It is said that this has been decided in several cases, and *Levick's Case* (1) and *Sidney's Case* (2) have been cited in support of this contention. But this case, like others, must be decided by reference to the surrounding circumstances.

Now it has occurred to me that when it appeared that there were no shares which Mr. Mackley could have had if he had wanted them, the company were not in a position to say that they would continue to hold him liable for the shares for which he had signed.

It is true that this is a new case, but though the decision of no Judge has been actually given upon facts like the present, it is evident that the opinion of the Lords Justices in *Evans's Case* (3) would have accorded with the view I have now taken if the point had arisen in that case. In that case Mr. Evans had subscribed the memorandum of association of the company for ten shares, and had for a short time acted as a director. Afterwards other directors were appointed, and he never had anything more to do with the company. No shares were ever allotted to him. But, though all the shares were in the first instance allotted to other persons, it

(1) 40 L. J. (Ch.) 180. (2) Law Rep. 13 Eq. 228.
(3) Law Rep. 10 Ch. 157.

appeared that the allotment of some of them had never been confirmed in the manner required by the articles of association, and consequently there were in fact shares which might have been allotted to Mr. Evans. The Lord Justice Turner, in giving judgment, says (4): "If indeed all the shares had been allotted to others, a question might have arisen; but 4,000 shares only were allotted subject to confirmation, and this never took place; therefore there are still 4,000 shares not allotted, and, for the shares in respect of which he must be considered allottee, he must be placed upon the list."

That remark exactly fits the present case. The Lord Justice Lord Cairns also says (5): "It is said that the shares which Mr. Evans would have had, were allotted to other people, but it seems that the allotment was not final, and that there were left at all times shares sufficient to answer the right of Mr. Evans." Can anything be more clear than that if there had been no shares he would have been relieved from liability?

In the present case no one has been deceived. It cannot be said that any creditor has given credit to the company because Mr. Mackley subscribed the memorandum of association in 1863. And there is no equity on the part of any contributory. If the shareholders intended to look to Mr. Mackley, they should not have allotted the shares to other persons. I am of opinion that this is an unjust demand as regards both creditors and contributories. The costs will be paid by the liquidator, and he will be at liberty to retain them out of the estate. If the estate is insufficient there will be liberty to apply.

Obligation of Subscribers to Memorandum of Association.

IN RE GLORY PAPER MILLS COMPANY, DUNSTER'S CASE.

1894, L. R. 3 Ch. D. 473.

THE COURT OF APPEAL.

The Glory Paper Mills Company, Limited, was registered on the 3rd of May, 1887, under the Companies Acts, 1862 to 1883, the

(4) Ibid. 2 Ch. 429. (5) Law Rep. 2 Ch. 430.

capital being £50,000 in 4,000 preference shares of £10 each, and 1,000 deferred shares of £10 each.

The memorandum of association of the company was dated the 2nd of May, 1887, and was signed by seven persons, amongst whom was T. M. Dunster, who signed for 100 preference shares. He was a partner in the firm of Dunster & Wakefield, and it was alleged that the firm had at this time agreed to undertake the agency of the company, and that Dunster really signed the memorandum as representing his firm, because the Registrar of Joint Stock Companies insisted on accepting the names of individuals only as signatories of the memorandum.

Dunster also signed the articles of association. He was named as one of the first directors in the articles, which provided that the qualification of a director should be the holding of shares of the nominal amount of £1,000 at the least; and that the office of a director should be vacated if a director should cease to hold his qualification shares, or should not acquire the same within three months after appointment; but that a director might act before acquiring his qualification shares.

Dunster did not make any further application in his own name for shares; but on the 17th of May, 1887, he signed in the name of his firm and sent to the company the following form of application addressed to the directors:—

"Gentlemen,—Having paid to the company's bankers the sum of £1,000, 100 preference shares of £10 each in the above company, I request you to allot me that number of shares upon the terms of the prospectus dated May 5th, 1887, and subject to the memorandum and articles of association of the company, and I hereby agree to accept the said shares or any smaller number that may be allotted me, and to become a member of the company in respect thereof, and I authorize you to place my name upon the register of shareholders for the number of shares so allotted to me."

(Signed) "Dunster & Wakefield."

The £1,000 was paid by the firm; the 100 shares were allotted to them on the 24th of May, 1887, and they were placed on the register accordingly.

On the 27th of June, 1887, Dunster & Wakefield wrote to the directors of the company as follows: "Gentlemen,—We will undertake the agency of the Glory Paper Mills Company, Limited, for 2½ per cent. commission on the gross amounts, and all paper to come through us, and we invoice the paper in our names, and we will if wanted make advances on paper sent up at 5 per cent. per annum."

These terms were accepted on the 15th of July, with some additional stipulations. No shares were ever allotted to Dunster individually.

The company filed its own petition for winding-up on the 19th of February, 1894, and on the 8th of March, 1894, an order was made for a compulsory winding-up.

The official receiver and liquidator placed the name of Dunster on the list of contributories for 100 shares. Dunster took out a summons to have his name removed from the list. The summons was adjourned into Court, and heard before Mr. Justice Vaughan Williams on the 18th of July, 1894.

Affidavits by Dunster and by other directors, and the secretary of the company, stated that when Dunster & Wakefield agreed to become agents for the company, in or about May, 1887, it was agreed that the firm should take, and pay up in full, 100 shares, in consideration of the firm having the agency of the company, with a commission of 2½ per cent. on the gross amounts; that the firm was to be entitled to the shares and to pay for the same in full on allotment; that in pursuance of such agreement Dunster signed the memorandum of association in his own name, it being understood that the memorandum must be signed by individuals and not by firms; that in order to carry out such agreement it was considered necessary for Dunster to fill up an application form, and that he should do so in the name of the firm, so that the shares might be allotted in the name of the firm, so that the sole reason why the application was signed by Dunster in the name of the firm was to have the shares allotted to the firm and not to himself individually; that the memorandum of association and application for shares formed one transaction only, and not two applications by Dunster and the firm each for 100 shares; that the above facts were fully known to all the company's directors and officials, and had always been acquiesced in by the company; and that no application had been made to Dunster to take or pay for 100 shares in his own name.

Vaughan Williams, J., refused to remove the name of Dunster from the list of contributories. Dunster appealed.

In the Court of Appeal LINDLEY, L.J., said:—I think that the learned Judge has not come to a right conclusion in this case. The real question is whether there was one agreement to take shares or two. At the first blush, it looked as if there were two agreements; but it is plain from the evidence that the signing of

the memorandum by Dunster was in performance of the arrangement that his firm should be the agents of the company, and that his subsequent application on behalf of the firm for 100 shares was part of the same arrangement. The documents might have supported two agreements, but the evidence is all in favour of there being only one. How, then, does the matter stand in point of law? Dunster was bound to take 100 shares, and he asked that they should be put in the name of himself and his partner. Why should he be fixed with 200 shares? None of the parties understood that there were to be two agreements; and that is the true solution of this case.

Then with respect to the qualification. I do not feel any difficulty on this point. The articles say that the qualification of a director shall be the holding of 100 shares, and a director may act before he gets them. Mr. Dunster did hold the 100 shares, and there is nothing which requires him to hold them in his own name alone. If the company choose to take the extra responsibility of his partner that does not matter. The real question is reduced to one of fact. Was there one agreement to take 100 shares, or was there an agreement to take 200 shares? My opinion is that there was only one agreement for 100 shares, which Mr. Dunster has taken and which are fully paid up. Consequently Mr. Dunster's name must be removed from the list in respect of the additional 100 shares.

LOPES, L.J., and DAVEY, L.J., delivered judgment to the like effect.

Obligation of Subscribers to Memorandum of Association.

IN RE METALS CONSTITUENTS.

1902, 71 L. J. Ch. 323.

BUCKLEY, J.

On May 10, 1901, Metals Constituents, Ltd., was incorporated under the Companies Acts, 1862 to 1890, with a capital of £10,000, divided into 9,980 ordinary and 20 management shares of £1 each.

The memorandum of association was subscribed by Lord Lurgan for 250 ordinary shares.

Lord Lurgan afterwards declined to pay for the shares, alleging that he was not a shareholder, as he had been induced by misrepresentations of one Sims, who was one of the promoters of the company, to sign the memorandum.

On August 17, 1901, Lord Lurgan took out a summons asking that the register of shareholders might be rectified by the removal of his name therefrom in respect of all liability regarding the shares.

The summons was not brought to a hearing.

On October 23, 1901, resolutions were passed for the voluntary winding up of the company and the appointment of a liquidator.

The liquidator settled the name of Lord Lurgan on the list of contributories.

On January 28, 1902, Lord Lurgan took out a summons asking that the list of contributories might be varied and his name excluded.

BUCKLEY, J.—This is a summons by Lord Lurgan to vary the list of contributories and exclude his name therefrom. Having subscribed the memorandum of association for 250 shares, he now seeks to be relieved in respect of those shares on the ground of misrepresentation. For the purposes of the earlier part of my judgment, I will assume that there was a misrepresentation; that is to say, that Sims made to Lord Lurgan before incorporation a representation which was untrue. Is Lord Lurgan, having signed the memorandum, entitled to rescission of the contract by reason of such misrepresentation? I think not. Sims was not the agent of the company when he made the misrepresentation, because the company did not exist. Lord Lurgan therefore was not induced to subscribe the memorandum by the misrepresentation of the company or its agent. The contract of the subscriber of a memorandum of association is of a very peculiar kind. Down to the moment when registration takes place, there is no contract, because the corporation does not exist, and any contract by the signatories must be with the corporation. At the moment when the memorandum is registered two things instantly take effect. The corporation springs into existence, and the subscribers by virtue of section 23 of the Companies Act, 1862, become members. There is no executory contract which is subsequently executed. There is no contract at all until the moment when the corporation and the character of membership in the subscribers come simultaneously into existence. Under these circumstances the subscriber cannot have rescission on the ground that he was induced by misrepresentation made by an agent of the company.

But can Lord Lurgan get relief on the principle that, where one party to a contract has obtained a benefit by an inducement which misled the other party, though the first party was wholly innocent in the matter, it may be a fraud in such first party to insist on the contract? I think not. The scheme of the Act is that the corporation owes its existence under section 6 to the signatures of seven persons to the memorandum of association. Section 23 says that "the subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register * * * and every other person who has agreed to become a member * * * and whose name is entered on the register of members, shall be deemed to be a member." The contract effected by signature of the memorandum and registration of the company is not merely a contract created between the subscriber and the corporation. It is a contract whose existence is the basis of the creation of the corporation as one of the contracting parties; and every other person who becomes a member becomes such on the footing that that contract exists. Section 18 says that "Upon the registration of the memorandum of association, * * * the registrar shall certify under his hand that the company is incorporated. * * * The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum," and so on. So when the corporation came into existence the effect of the Act was that it necessarily existed with Lord Lurgan, among others, as members of it. If Lord Lurgan could come within the principle of *Karberg's Case* (1), and be relieved from the contract on the ground that the corporation cannot retain the benefit of it as having been entered into on the faith that the misrepresentation made by Sims was true, then every person who subsequently became a member in the belief that Lord Lurgan was one would be deprived of the benefit which he supposed he had by Lord Lurgan being such. In *Karberg's Case* (1) the acceptance of the application for shares by the allotment of the shares was the acceptance of an offer made on the terms of the prospectus, although that prospectus was issued by the promoters. In the present case no allotment to Lord Lurgan was necessary. His signature to the memorandum of association made him on registration a member of the company, and bound him not only in favour of the company, but in favour of every other

(1) 61 L. J. Ch. 741; [1892] 3 Ch. 1.

person who became a member of the company. Therefore, as it seems to me, on the law Lord Lurgan must fail.

But also on the ground of fact I think he fails too. [His Lordship considered the facts at length, and held that Lord Lurgan, knowing the circumstances, had elected to keep the shares, and on that ground must fail.]

The application must be dismissed with costs.

Assumed Subscription Before Actual Incorporation

IN RE THE LONDON SPEAKER PRINTING COMPANY—PEARCE'S CASE.

IN RE THE SPEIGHT MANUFACTURING COMPANY—BOULTBEE'S CASE.

1889, 16 Ont. A. R. 508.

THE COURT OF APPEAL, ONTARIO.

Appeals by Pearce and Boultbee from orders dismissing their applications to remove their names from the list of contributories.

On 13th October, 1887, Pearce signed a document, apparently under seal, purporting to subscribe for shares in the company.

On 5th December, 1887, he wrote the promoter cancelling the subscription.

The letters patent incorporating the company were issued on the 30th of August, 1888, and were in the usual form, constituting the persons therein named, "and each and all such other person or persons as now is or are or shall at any time hereafter become a shareholder or shareholders in the said company, a body corporate and politic."

Pearce was not one of the petitioners for incorporation, and was not one of the corporators named in the letters patent. He was entered in the stock-book of the company as a shareholder, and notices of meeting and of calls and demands for payment of calls, were sent to and received by him. He took no notice of these notices and demands and never attended any meetings or took any part in the proceedings of the company, but took no steps to have his

subscription cancelled beyond writing the letter above set out and making oral requests to Butcher from time to time to cancel the subscription. There was no proof of any formal allotment of shares to him.

A petition under the Ontario Winding-up Act was presented in January, 1889, and a winding-up order was made on the 6th of February, 1889. Pearce was placed on the list of contributories by the liquidator, and on appeal the Judge of the County Court of Middlesex upheld the liquidator's action.

Boultbee signed a document, of which the following are the material portions:

THE SPEIGHT MANUFACTURING COMPANY (Limited).

Capital $200,000 in 2,000 shares of $100 each. We, the undersigned, hereby agree to accept the number of shares set opposite our respective signatures of $100 each in the capital stock of The Speight Manufacturing Company (Limited), and further agree to pay $5 per share on the same at the time of allotment, and not more than $25 per share to be paid the first year of the organization of the company.

The company was not at the time incorporated. Subsequently letters patent under the Joint Stock Companies Letters Patent Act were issued incorporating the company, but Boultbee was not a petitioner for their issue, and was not named in them as one of the corporators. He was, however, entered in the books as a shareholder, and notices of meeting and of calls were sent to him, but no formal allotment of shares to him was proved.

The company carried on business for over six years, Boultbee not attending any meeting or taking any part in its proceedings, but never repudiating his subscription or seeking to be released. The company was ordered to be wound up under the Ontario Winding-up Act, and Boultbee was placed on the list of contributories by the liquidator, and on appeal the Judge of the County Court of York upheld the liquidator's action.

Pearce and Boultbee appealed.

BURTON, J.A.:—The question in all such cases, briefly stated, must be, whether a binding contract to take the shares has been entered into between the company and the person unwilling to admit his liability.

In this case the liability of the appellant depends upon the meaning to be given to the words used in the Joint Stock Companies Act, defining a shareholder, which it is said shall mean every subscriber to or holder of stock in the company. How does he fall within this definition? He has neither subscribed for

stock nor had any stock allotted to him. If the memorandum could be treated as a request to have a certain number of shares allotted to him, the request was withdrawn before any allotment was made; and he has never in point of fact since the company came into existence subscribed to any stock in it.

In the English Acts subscribers to the memorandum of agreement made in anticipation of the incorporation are specially made liable as members—the words of the Act being "Subscribers of the memorandum of association of any company under this Act, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company, shall be entered as members on the register; and every such person whose name is entered on the register shall be deemed to be a member of the company."

There is no obligation that I can see on the part of the company to give him these or any number of shares. The signing of the agreement might or might not have given to the other parties named in it a right of action against him for refusing afterwards to take shares: upon that I express no opinion.

We have had occasion in more than one case to point out that there can be no such thing as ratification of a contract which could not have been made binding on the ratifying party at the time it was made. At that time the company had no existence. There must be two parties to a contract, and even if the contract had been made with a person professing to be a trustee for the proposed company, it would not have carried the case further as he could not be agent for a principal who had no existence.

If the applicant had once become a shareholder, then I agree with the learned Judge below, that his repudiation would not have availed him. Even if he had been induced by any misrepresentation to enter into the contract, it would have been necessary for him to have commenced proceedings to set it aside before the making of the winding-up order. But, in the absence of any provision similar to that to be found in the English Acts making the subscription irrevocable and binding as a subscription to the capital of the company as fully as if it was then in existence, I think the letter prevented the subscription having any validity as between the appellant and the company.

The learned Judge probably followed the decision of the Chancellor in *In re The Queen City Refining Co.* (1); but looking at that decision, I should be inclined to think that that learned Judge was

(1) 10 O. R. 264.

under the impression that the subscription was subsequent to the issue of the patent; and I am the more confirmed in this view inasmuch as in a subsequent decision, *Re Zoological and Acclimatization Society* (2), he referred to the case of *European R. W. Co.* v. *McLeod* (3), in which the subscription was made after the passing of the Act of Incorporation, as in accord with the former decision.

The description of a contributory under the Winding-up Act does not seem to contemplate that any one but a shareholder or member of the company shall be placed upon the list, although this would probably be held to include a person who had entered into a binding contract with the company to take shares.

OSLER, J.A.:—If any liability is cast upon a person who, prior to the issue of the letters patent, has signed an agreement to subscribe for shares in a projected company, but who is not one of the corporators mentioned in the letters patent, and has subsequently refused to subscribe or apply for or accept shares, it must be a statutory and not a contractual or common law liability, as there can be no privity of contract between him and a company which was not in existence when he became a subscriber. It is hardly necessary to cite authority for this, but I may refer to the recent case of *In re Northumberland Avenue Hotel Co.* (4) See also *Thames Navigation Co.* v. *Reid* (5).

The persons mentioned in the Winding-up Act as those who are liable to be placed upon the list of contributories are the shareholders and members of the company. The appellant is not a member of the company within the meaning of that term as explained in sub-section 3 of section 14. We have to consider whether he is a shareholder.

Section 2, sub-section 6, of the Companies Act, R. S. O. ch. 157, enacts that the word shareholder shall mean every subscriber to or holder of stock in the company, and shall extend to and include the personal representatives of the shareholder.

On the books of the company the appellant appears to be a shareholder, as his name is entered therein as such, and the books are by section 54 of the Act *prima facie* evidence of the facts therein stated. But they are not conclusive, and the person charged may shew that his name was put there without his authority. This, so far as the claim against him is founded on contract, the appellant has succeeded in doing. There was no application by him to the company for shares, and, therefore, no

(2) 17 O. R. 331.
(3) 3 Pugs. 3.
(4) 33 Ch. D. 16.
(5) 13 A. R. 303.

authority to them to allot shares or to enter his name as a shareholder, unless they derived it from his subscription to the agreement made before the issue of the letters patent. "To constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for and a communication by the directors to the applicant of the fact of such allotment having been made." *In re Scottish Petroleum Co.* (6).

The question, therefore, is, whether the appellant answers the description of the persons mentioned in the Act. Is he a subscriber to stock in the company? If he is, it is because the Act makes him so, and in that event only would he be properly entered on the company's books as a shareholder.

In some of the Imperial Acts, *e.g.*, 7 & 8 Vic. ch. 110, sec. 3; 8 & 9 Vic. ch. 16, sec. 3, subscribers are defined to be persons who have agreed in writing to take shares in a proposed company, but who have not executed the deed of settlement. In others, persons who have already subscribed as well as those who shall thereafter subscribe are united into a company, and the directors are empowered to demand payment of the sums subscribed, and to place the subscribers upon the register of shareholders. See *Thames Tunnel Co.* v. *Sheldon* (7), *Kidwelly Canal Co.* v. *Raby* (8), *Burke* v. *Lechmere* (9), *Portal* v. *Emmens* (10).

In all such cases liability is directly imposed upon previous subscribers by the terms of the Act. So in cases arising under the Companies' Act, 1862, the signing of the memorandum of association is by force of the 23rd, 38th, and 74th sections of the Act deemed to be a contract to take shares and to make the parties to it liable as contributories when placed on the register. Lindley on Partnership, 4th ed., vol. 1, 158-9; *In re Scottish Petroleum Co.* (11), *In re Florence Land Co.* (12).

Our Act contains no definition of the term subscriber, but, looking at section 44, which enacts that the directors may call in and demand from the shareholders all sums of money by them subscribed, when and where and in such payments as the letters patent or the Act or the by-laws of the company prescribe or allow, I think a subscriber may, for the purpose of the Act, be described

(6) 23 Ch. D. 413, at p. 430.
(7) 6 B. & C. 341.
(8) 2 Price 93.
(9) L. R. 6 Q. B. 297.
(10) 1 C. P.-D. 201, 264.
(11) 23 Ch. D. 413, at p. 429.
(12) 29 Ch. D. 421, at pp. 427-8, 444.

"as a person who has put down his name to a contract by which he binds himself to contribute to the extent of the number of shares for which he puts down his name."

This, however, carries the case no further, for the expression, "a subscriber to stock in the company," must mean by a contract with the company, unless the Act has given it a wider meaning, and this, in my opinion, it has not done.

An examination of the 4th, 6th, 7th, and 42nd sections of the Act will shew that the security which the Legislature provides for the protection of persons dealing with the company at the moment of its inception, is to be ascertained by the charter itself, or by the instruments upon which it is required to be founded, the object being that the public may not be misled as to the names and character of the persons who have founded the company and have agreed to become shareholders.

The charter may be granted to any number of persons not less than five who shall petition therefor, constituting such persons and *others who may become* shareholders in the company thereby constituted a body corporate, &c.—Section, 4.

The applicants are to give the prescribed notice of their intention to apply for the charter, stating, *inter alia*, the amount of the capital stock of the intended company: the number and amount of the shares and the names and addresses, &c., of each of the applicants.—Section 6, (*d*), (*e*), (*f*).

If the petition is not signed by all the shareholders whose names are proposed to be inserted in the letters patent, it shall be accompanied by a memorandum of association, signed by all the persons whose names are to be so inserted, &c., containing the particulars required by section 6.—Section 7, (4).

If the letters patent make no other definite provision, the stock of the company *so far as it is not allotted thereby*, shall be allotted when, and as the directors by by-law or otherwise ordain.—Section 42.

The shareholders, then, at the date of the issue of the letters patent, are those persons only who are named therein, and to whom stock is allotted thereby, and these are the signers of the petition and of the memorandum of association. The public have no notice of any others, nor do any others hold themselves out as responsible.

It is these persons and others who may thereafter become shareholders who constitute the company. No rights are reserved to those who may have previously agreed to subscribe for or to

take stock but who have not chosen to become parties to the petition or memorandum of association, for the allotment of the stock, so far as it is not allotted by the charter, is left to the uncontrolled discretion of the directors.

I see nothing in the Act which binds a person in the situation of the appellant to take shares in the company or which justifies the directors in putting his name upon the stock register.

As between the company and himself the alleged agreement is mere waste paper, it being neither an actual contract with the company, nor made so by the Act, and, that being so, it cannot in itself have any efficacy even as an application to the company for shares, so as to be the foundation of an actual contract with the company. In this view the appellant's request that his signature should be cancelled is of no importance one way or the other, although it would not have relieved him if we had been compelled to yield to the liquidator's contention that the Act made him a subscriber.

I have said that the alleged agreement cannot, by itself and without more, constitute an application, for I have no doubt that an application for shares may be prepared and signed previous to the formation of the company, and entrusted to a promoter or broker or other person interested in the company, to be made use of or acted upon afterwards. Or a person desirous to become a shareholder may authorize an agent beforehand to apply for shares on his behalf upon the incorporation of the company: *Lawrence's Case* (13), *Oakes* v. *Turquand* (14). All I mean to say is, that we cannot infer such authority to any one from the instrument in question, and cannot treat it as an application to a company which had not even an inchoate existence.

It is clear that the appellant is not a shareholder, and that the order to settle him on the list of contributories should be discharged.

I may add that the question raised on this appeal was decided by the Queen's Bench Division in the case of *Tilsonburg Agricultural Manufacturing Co.* v. *Goodrich* (15), in an action against the alleged shareholder for calls, in accordance with the views above expressed. The respondent relied upon a decision of the learned Chancellor in the case of *In re The Queen City Refining Co.* (1), but I think it is evident from a later decision of the same learned

(13) L. R. 2 Ch. 412, at p. 421. (14) L. R. 2 H. L. 325.
(15) 8 O. R. 565.

Judge, *Re Zoological and Acclimatization Society* (2), and his reference there to *European R. W. Co.* v. *McLeod* (3), that he was under the impression that the subscription in respect of which he held the party liable was after the incorporation of the company.

MACLENNAN, J.A., concurred.

Appeal allowed with costs.

BOULTBEE'S CASE.

BURTON, J.A.:—The only material difference between this and Pearce's case is, that there was no repudiation here by Boultbee before the issue of the letters patent.

The case seems to be on all fours with *In re The Queen City Refining Co.* (1), and indeed the learned Judge intimates in his judgment that he followed that case, which was binding upon him.

We have already decided in the Pearce case that the subscription or agreement to take stock in a company which had then no existence, is not a binding agreement with that company to take stock in it when it comes into existence.

But if it can be treated as an application for stock, I do not see how it is possible to hold that there is any evidence here of a concluded agreement.

To quote Lord Justice Baggallay's words in *In re Scottish Petroleum Co.* (6): "To constitute a binding contract to take shares in a company where such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made."

The directors never did as a Board make any allotment, and it is needless therefore to add that the fact of such an allotment having been made, could not have been communicated to the appellant.

It is true the secretary assumed to treat him as a shareholder, and probably sent him notices of calls, but this would not dispense with a regular allotment.

Test the matter in this way, if the company had turned out to be very prosperous, could the appellant have insisted upon being

registered as a shareholder? It can, I think admit of but one answer.

Mr. Gregory referred to the case of *In re London and Provincial Consolidated Coal Co.* (16), but that case proceeded upon the provisions of the English Act which enacts that the subscriber to the memorandum of association shall be deemed to have agreed to become a member, and he thereby contracts to become a shareholder for the number of shares subscribed for and becomes absolutely bound to take them and pay the proper consideration for them. I have endeavoured to point out that there is no such contract in the present case; and even if the memorandum can be treated as an application, no allotment.

Seeing that for nearly seven years no attempt was made to enforce this subscription, it is not unreasonable to assume that the company were willing to accept those of the original subscribers who volunteered to remain shareholders, and may explain why a formal allotment was never made.

I am of opinion that the appellant was improperly placed upon the list of contributories, and that the appeal should be allowed.

OSLER, J.A.:—There is no substantial distinction between this case and Pearce's case in which we have just given judgment. There is a slight, though not material, difference in the form of the alleged contract. The appellant and a number of other persons agreed, not saying with whom, "to accept the number of shares set opposite" to their signatures in the stock-book of the company, and to pay $5 per share on the same at the time of allotment. But the company had not then been incorporated, and the appellant was not one of the applicants for the charter and did not sign, so far as appears, the memorandum of association, if there was one, mentioned in section 7, sub-section 4, of the Ontario Joint Stock Company's Act, R. S. O., 1877, ch. 150; R. S. O., 1887, ch. 157. The persons who hold themselves out to the world as the shareholders in and subscribers to stock in the company at the time of its incorporation, are the applicants for the charter and the signers of the memorandum, and they and others who may afterwards become shareholders, constitute the company. The appellant was not a subscriber to stock in the company, and was not bound to accept shares therein, for the instrument he signed was not an agreement with the company, and the Act has imposed no liability upon him in respect of it. The reasons given by me in Pearce's case for holding that the

(16) 5 Ch. D. 525.

paper signed by him could not by itself be regarded as an application for shares in the company when it should become incorporated, apply quite as forcibly to that signed by the appellant. In the absence of evidence that any one was authorized to use it when the company came into existence, and to apply for shares on behalf of the appellant, it is, so to speak, no more than a declaration in the air that he would accept shares in such a company and binds him to no one. Even, however, if it could be looked upon as an application there is no evidence that any shares were in fact allotted by the directors of the company. The appellant was, therefore, neither a subscriber to stock in the company, nor did he after its incorporation become a shareholder by contract evidenced by application and allotment of shares. *Quâcunque viâ,* he is not a shareholder within the meaning of the Act, and is not liable to be placed on the list of contributories.

MACLENNAN, J.A., concurred.

Appeal allowed with costs.

The Contract for Shares in a Company Formed.

In companies existing under the English and similar Acts the register of members is open to the public. Hence has arisen a rule of estoppel, the result of which is that a person whose name is, with his knowledge, on the register as a shareholder, and who, therefore, permits himself to be held out as a shareholder may be precluded from denying obligation as such. The sections of the Ontario and Manitoba Acts regarding stock register do not go so far. The right of inspection of the register is more limited, and therefore, the rule of estoppel may not prevail in such jurisdictions, at least to the same extent. The register is under the latter Acts *prima facie* evidence, but as it is not so generally available to inspection there cannot be said to be the "holding out" which follows from the English system of open register.

The defence of fraud is frequently raised in resistance to demands for payment of moneys upon calls on shares. Where liquidation proceedings have intervened that defence is lost as mentioned in cases in the group following. Otherwise than as above the rules as to liability to pay for shares are similar to those applied in other contract relations.

Delay in Allotment of Shares.

RAMSGATE VICTORIA HOTEL COMPANY v. MONTEFIORE.

1866, 35 L. J. Ex. 90.

THE COURT OF EXCHEQUER.

Shares were applied for on the 8th June. They were allotted on the 23rd November. Defendant declined to accept. The company sued for calls. Cross-action was brought to recover deposit.

The Court gave judgment against the company on the ground that the allotment was not within a reasonable time after the application for shares.

Withdrawal of Application for Shares Before Allotment.

IN RE UNIVERSAL NON-TARIFF FIRE INSURANCE COMPANY, RITSO'S CASE.

1876, L. R. 4 Ch. D. 774.

THE COURT OF APPEAL.

This was an application by Ritso that his name might be removed from the list of contributories of the company in respect of 450 shares.

The company was registered on the 29th of March, 1871, with a nominal capital of £250,000, in 100,000 shares of £2 10s. each, but no more than 1,119 were ever taken. Ritso was a subscriber to the memorandum of association for one share, and was one of the first directors named in the articles. The qualification for a director was the holding fifty shares. Ritso applied for fifty shares, and at a Board meeting of the 24th of May, 1871, it was ordered that the shares which had been applied for should be allotted. At another Board meeting, on the 21st of June, he was elected Chairman of the Board. The fifty shares were issued to him on the 21st of June, and were registered in his name. He paid the deposit of 5s. per share, which was required to be paid on

application, and he duly paid all subsequent calls that were made in respect of these shares until they were paid up in full, and as to them no question arose.

The liquidator adduced evidence to the effect that Ritso had before and after the registration of the company requested several persons to take shares, representing himself as going to take 500 shares—that, in order to induce the directors to commence business, which they did in June, 1871, with only 1,119 shares taken up, he represented that he was going to take more shares, and that on various occasions he stated to the Board that he was going to take 450 more shares. The liquidator's evidence also went to shew that Ritso was elected Chairman on the faith of his being thus about to become largely interested in the company. Ritso contradicted all these statements. It was, however, undisputed that at a meeting of the directors on the 13th of February, 1872, another director pressed Ritso to take 450 more shares, insisting that he had promised to do so, and that Ritso either denied the promise or stated it to have been conditional on the company's getting into a sound condition; but it was disputed whether he did not subsequently at the same meeting admit the promise. Subsequently Ritso signed an application, dated the 5th of March, 1872, for 450 shares. This application was on one of the common printed forms, but in filling it up Ritso struck out the statement as to payment of the deposit of 5s. per share, and he never paid it. He stated, on cross-examination, that he struck out the above statement to indicate that his application for shares was not absolute, but conditional, the condition, as he alleged, being that a certain number of shares in the company should be taken up. On the other hand, the manager of the company deposed that at the meeting of the 13th of February, 1872, Ritso said that he would take the 450 shares, but that he thought he ought to be allowed a liberal commission on them. The manager went on to say—"Admiral Elliott then asked what commission, and Mr Ritso said he thought he ought to be allowed 5s. a share. I was then requested to prepare a paper for Mr. Ritso's signature, but Mr. Ritso refused then to sign, on the ground that it was pressing him too hard, and it was then left with Mr. Ritso to arrange the consideration with me and complete the application by filling up the necessary form. I subsequently pressed Mr. Ritso to fill up the form, and he filled up the form dated 5th March, 1872." He went on to say that the striking out of the 5s. was acquiesced in, because the amount of commission which Ritso was to receive had not been settled.

Matters remained in this state till a Board meeting on the 14th of October, 1872. The minute of this meeting, so far as related to the present subject, was as follows:—

"Monday, 14th Oct., 1872. Present, F. C. G. Ritso, in the chair. Mr. White, Mr. Stent. It was proposed by Mr. Stent, and seconded by Mr. White, that the 450 shares applied for by Mr. Ritso be allotted."

This was the last Board meeting ever held, and the minutes were never signed by the chairman. Ritso deposed that he protested against the allotment on the ground that he had long ago verbally withdrawn his offer. It was denied on the other side that he did so protest, but it was undisputed that before he left the room, though after the other two directors had left, he wrote and handed to the manager a letter formally withdrawing his application for shares. On the following day the manager sent him a letter of allotment for the 450 shares.

On the 31st of October, 1872, the company passed a resolution to wind up, which was confirmed on the 15th of November, and registered on the 3rd of December, 1872. On the 20th of December an order was made for continuing the winding-up under supervision.

The liquidator having included Ritso's name in the list of contributories in respect of the 450 shares, Ritso applied to remove it.

Malins, V.C., dismissed the summons and Ritso appealed.

James, L.J.:—I am of opinion that the order of the Vice-Chancellor cannot be sustained, and that Mr. Ritso's co-directors, whatever their wishes may be, have not succeeded in fixing him with the 450 shares in dispute. It is clear that there was no regular allotment of them, nor any such application for them as was usually made. At the meeting of the 13th February, 1872, it was admitted that there was then no binding agreement to take shares, for there was a struggle as to Ritso's fulfilling a verbal promise from which he was trying to escape. I admit that a formal agreement is not necessary; if there is anything containing the terms, "We accept you as a shareholder in respect of 450 shares," and "I agree to become a shareholder in respect of 450 shares," that will be enough. If the substance of an agreement is made out, the form is not material. But here it has to be made out that there was any such agreement. This gentleman was anxious to get people to join the company, and he represented to various persons, in order to induce them to take shares, that he

himself was going to become a large shareholder. That was a statement of his intention to become such, and this is all that took place until he signed the paper of application for shares on the 5th of March, 1872. Up to that time clearly nothing had occurred which bound the company to give him, or him to accept, the 450 shares. There might have been representations which would give to third parties a right of action; but up to that time there was no agreement between Ritso and the company as to these shares. He was called upon to fulfil his verbal promise, to satisfy the honourable obligation he was under, and he accordingly signed a paper applying for 450 shares, but he signed it after striking out the clause as to payment of the deposit. He deposes that he struck it out to shew that his application was not absolute but conditional, though certainly this was a singular way of denoting a condition. The application was not immediately followed by an allotment of shares. Why it was not is not clear on the evidence, but probably the evidence of the liquidator furnishes the reason—that Mr. Ritso had asked for a commission on these shares, and that the matter stood over to see whether the directors would agree to this. Whatever the reason may have been, the application was not acceded to until a subsequent meeting, by which time it had been withdrawn, if Ritso had a right to withdraw it. As it had not been accepted, he had, in my judgment, a right to withdraw it, and cannot be held to have entered into a concluded agreement to take these shares.

BAGGALLAY, J.A., and BRAMWELL, J.A., expressed themselves likewise.

Subscription Under Seal for Shares. Issue and Allotment.

NELSON COKE AND GAS COMPANY ET AL. v. PELLATT.

1902, 4 O. L. R. 481.

THE COURT OF APPEAL, ONTARIO.

The action was tried before Lount, J., who, in the course of his judgment (2 O. L. R. 390), described the facts as follows:—

LOUNT, J.:—The plaintiff company are an incorporated joint stock company formed under the provisions of The Companies Act, 1897, of the Province of British Columbia, and the individual plaintiffs were the applicants for the charter of the company, and are now the directors. This

action is brought by the individual plaintiffs to enforce payment by the defendant of $10,000, alleged to be due and payable to them on the following agreement:—

"The Nelson Coke and Gas Company, Limited.

"Application having been made by W. H. Pearson, W. H. Pearson, Jr., P. E. Doolittle, L. L. Merrifield, and E. C. Arthur, under the provisions of The Companies Act, 1897, of the Province of British Columbia, for a charter or letters patent of incorporation of a joint stock company under the name of 'The Nelson Coke and Gas Company Limited,' having an authorized capital of $250,000, divided into 10,000 shares of $25 each, of which the directors are to have power to issue not more than 3,000 shares, or $75,000, as preference shares bearing a preferential dividend at and limited to 7 per cent. per annum, cumulative, and having the right in a winding up to repaymnet of capital in priority to the ordinary shares.

"We, the undersigned, do hereby severally subscribe for and agree to take the respective amounts of the capital stock of the said company and of the class thereof set opposite our respective names as hereunder and hereinafter written, and to become shareholders in such company to the said amounts, when and as the said stock so subscribed for by us severally shall be issued and allotted to us, after the incorporation of the said company, and we do hereby severally covenant each with the other and others, and with the said W. H. Pearson, W. H. Pearson, Jr., P. E. Doolittle, L. L. Merrifield, and E. C. Arthur, and each of them and with the said company (when incorporated) and the directors thereof to accept the said stock when the same shall be alloted to us severally, and to pay for the same to the said company at par when and as a call or calls for payment shall be made upon us severally by the directors.

"In witness whereof we have set our hands and seals respectively this first day of September, 1899."

It is contended by them that under this agreement the defendant is indebted upon his covenant to pay for 200 preferred shares at $25 per share—$5,000; and for 200 common or ordinary shares at $25 per share—$5,000.

The plaintiff company and the directors also are joined in the action to enforce payment by the defendant of $10,000 alleged to be due and payable to them on the following agreement:—

"The Nelson Coke and Gas Company, Limited.

Capital, $250,000. Shares, $25 each.

Preference Stock, 7 per cent., cumulative ..... $ 75,000

Common Stock 175,000

"We, the undersigned, do hereby severally subscribe for, and agree to take, the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof set opposite to our respective names as hereunder and hereinafter written, and to become shareholders in said company to the said amounts, when, and as the said stock so subscribed for by us severally, shall be issued and allotted to us; and we do hereby severally covenant, each with the other and others, with the said company and the directors thereof, to accept the said stock when the same shall be allotted to us, severally, and to pay for the same to the said company at par, when and as a call or calls for payment shall be made upon us severally by the directors.

"In witness whereof we have set our hands and seals this 1st day of September, 1899."

And it is contended by them that under this agreement the defendant is indebted upon his covenant to pay for 200 preferred shares at $25 per share—$5,000; and for 200 common or ordinary shares at $25 per share—$5,000. It is admitted that the shares sued for by the individual plaintiffs and by the plaintiff company and the directors are the same shares, and the plaintiffs are only entitled—if the defendant is liable at all—to recover for the one sum, $10,000, but the plaintiffs say both agreements are alive and operative, and that they can recover under either or both. They also say that these shares were duly allotted to the defendant, notice of allotment was duly given to him, and the shares were duly called in, and thereby he became liable.

The defendant denies all liablity and contends that the first agreement was a provisional one, and was completed and satisfied by the execution

of the second agreement, which is an application to take stock subject to the terms thereof, and that the company did not accept this application, and did not within a reasonable time allot the stock to him and did not give notice of allotment, and thereby he became released from any liability to take the stock or pay calls thereon. He further says the stock not having been allotted to him within a reasonable time, he withdrew his application and subscription therefor and duly notified the plaintiffs. He denies that the company have made any call or calls upon him for payment of stock, and no money is due thereunder, and he denies making any contract with the individual plaintiffs.

And the learned Judge dismissed the action.

On appeal by the plaintiff to the Court of Appeal, the following judgment, in which Osler and Moss, JJ.A., concurred, was delivered by MacLennan, J.A.

MacLennan, J.A.:—I am of opinion that this appeal ought to be allowed.

The facts are very fully stated in the judgment.

It was argued by Mr. Scott (counsel for defendant) that the plaintiffs could not succeed as to the 200 preference shares, inasmuch as no such shares had been lawfully created, there not having been any special resolution of the company for that purpose, as provided by sec. 55 of the Companies Act, R. S. B. C. ch. 44.

The answer to that contention is, that provision was made for preference shares in the memorandum and articles of association. Section 5 of the memorandum is as follows: "The capital of the company is $250,000, divided into 10,000 shares of $25 each, with power to divide the shares in the capital for the time being into several classes, and to attach thereto respectively any preferential, deferred, qualified, or special rights, privileges, or conditions;" and sec. 3 of the articles is this: "The directors may, if they think fit, issue not more than 300 shares of the capital stock of the company as preference shares, bearing a preferential dividend at 7 per cent. per annum from the time when such shares have been subscribed for and fully paid up, payable half-yearly on the 15th days of January and July in each year, but to no further dividend, and the holders of such shares shall be entitled to receive such preferential dividend in priority to any dividend being paid on ordinary shares or stock, and also the right in a winding-up to repayment of capital and any arrears of dividend in priority to the ordinary shares."

That these provisions are legal and valid features of the constitution of the company is clear: *Ashbury Railway Carriage and Iron Co.* v. *Richie* (1), *In re South Durham Brewery Co.* (2).

(1) (1875), L. R. 7 H. L. 653. (2) (1885), 31 Ch. D. 261.

There is, therefore, no distinction such as suggested by Mr. Scott between the two classes of shares in question, and if the defendant is liable upon the one class, he is equally liable on the other.

The ground on which the learned Judge proceeded was that the first instrument executed by the defendant was superseded by the second, that the second was an application for shares, and there had been no allotment before he had withdrawn his application.

The company was incorporated under the Companies Act of British Columbia, R. S. B. C. ch. 44, on the 26th August, 1899, and the first document signed and sealed by the defendant is dated on the 1st September following, but was executed within two or three days afterwards. It is in the form of an agreement or covenant by the subscribers with five named persons, described as the applicants for the company's charter, and with the company when incorporated, to become shareholders in the company for the amounts of the capital stock and of the class set opposite their respective names, when the same should be issued and allotted to them, and to accept the stock when allotted to them, and to pay for the same when a call or calls should be made upon them by the directors. That document was executed by the defendant and two other persons. At that time an agreement or understanding had been come to between the defendant and Dr. Doolittle, one of the charter members and a director of the company, that the defendant should undertake to procure the subscriptions of the greater part of the shares for the company, for a commission. In the course of his canvass for subscriptions, it was suggested to the defendant that it would be better to have the subscriptions in a book, than upon the loose sheets which he himself and the other two persons had signed. A book was accordingly procured, with a subscription heading therein, of which the following is a copy:—

The Nelson Coke and Gas Company, Limited.
Capital, $250,000. Shares, $25 each.

Preference Stock, 7 per cent. cumulative..	$75,000
Common Stock	175,000

We, the undersigned, do hereby severally subscribe for and agree to take the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof, set opposite to our respective names, as hereunder and hereinafter written, and to become shareholders in said company to the said amounts, when and as the said stock so subscribed for

by us severally shall be issued and allotted to us; and we do hereby severally covenant, each with the other and others, with the said company, and the directors thereof, to accept the said stock when the same shall be allotted to us, severally, and to pay for the same to the said company, at par, when and as a call or calls for payment shall be made upon us, severally, by the directors.

In witness whereof we have set our hands and seals this 1st day of September, 1899.

Both the defendant and the other two gentlemen who had executed the first instrument, executed the new one, a few days after the first. The other two gentlemen struck their names out of the first instrument, but the defendant did not do so. If anything turned upon it, I should not be able to agree with the learned Judge that the defendant's execution of the second document superseded the first. The most he would say in evidence was, that in executing the second document, he did not intend it as a subscription for 400 shares in addition to the former. I do not think, however, that anything at all turns upon the question whether the old agreement was put an end to by the new. The legal effect of both is the same. In both the defendant covenants with the company to become a shareholder, to take 200 shares of each class, when issued and allotted, and to pay for them at par when calls should be made.

The evidence shews that when the defendant executed the agreement, he was in constant communication with Dr. Doolittle, a director of the company, and that they were associated together in obtaining subscriptions for shares on behalf of the company.

The contract in question is, therefore, one entered into by the defendant with the company, at the request of one of its directors, acting for and on behalf of the company.

In *Hebb's Case* (3), Lord Romilly said: "These applications for, and allotments of, shares must be treated upon the same principles as ordinary contracts between individuals." In *Gunn's Case* (4), Rolt, L.J., said (p. 43) that a contract between a company and a person who makes an application to become a member is the same in principle as an ordinary contract: that there must be the consent of two parties to a contract; one man may make an offer to another, and say, "I agree to buy your estate;" but the person to whom he has made the offer must say, "I agree to sell you the estate," or he must do something equivalent to an acceptance, something which satisfies the Court, either by words or con-

(3) L. R. 4 Eq. 9, 11. (4) L. R. 3 Ch. 40.

duct, that the offer has been accepted to the knowledge of the person who made the offer; and he adds: "I think that is requisite in the case of an application for shares, just as in the case of any other contract." Again, referring to the observations of Lord Cairns in *Pellatt's Case* (5), "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract," Rolt, L.J., says: "I did not take Lord Cairns in *Pellatt's Case* (5), to have meant that there must be a response in writing, but that what he meant was this—there must be in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer."

Treating this instrument, then, like an ordinary contract, what is its proper legal effect? The company was duly incorporated, and had $250,000 of capital to dispose of, divided into shares of $25 each, 3,000 being preference shares, and 7,000 common. One of the directors applies to the defendant to assist him in disposing of the shares. They find a number of purchasers who agree to purchase shares, and who execute the deed of subscription prepared for the purpose. The defendant witnessed the first three signatures, and afterwards executed the deed himself, agreeing to take the shares now in question. It is said this is an application or a request for shares. It may be so regarded; but it is something more than an application or request. It has all the elements of a completed contract, and that by deed, and for valuable consideration. The shares are the property of the company, and the defendant agrees with the company to purchase them, and to pay for them at par, when issued and allotted. There is no time limited within which the purchase is to be completed. It is not pretended that this deed was delivered in escrow or was not intended to take effect immediately. It was delivered to the company through its agent. It is said that this deed was revocable, and that the defendant could have revoked it and withdrawn from it the next day or the next moment. I do not understand such to be the law. No doubt a mere offer or proposal, either by parol or by mere writing, to take shares, is revocable before acceptance, like any other similar offer or proposal to buy or sell any other commodity: *Ritso's Case* (6). But it is otherwise when it is a contract by deed. In his treatise on Contracts, 6th ed., pp. 47, 48, Pollock says: "The ordinary rules of proposal and acceptance do not apply to promises made by deed. It is established by a series of authorities which

(5) L. R. 2 Ch. 527. (6) 4 Ch. D. 774.

appear to be confirmed by the *ratio decidendi* of *Xenos* v. *Wickham* (7), in the House of Lords, that a promise so made is at once operative without regard to the other party's acceptance. It creates an obligation which, whenever it comes to his knowledge, affords a cause of action without any other signification of his assent, and in the meanwhile it is irrevocable." Anson, 9th ed., p. 34, says: "An exception to this general rule as to the revocability of an offer must be made in the case of offers under seal. Such an offer cannot be revoked: even though it is not communicated to the offeree, it remains open for his acceptance when he becomes aware of its existence. There is no doubt that a grant under seal is binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if it has been duly delivered; and it would seem that an obligation created by deed is on the same footing. The promisor is bound, but the promisee need not take advantage of the promise unless he choose; he may repudiate it, and it then lapses."

I think these statements of the law are warranted by the case of *Xenos* v. *Wickham* (7), referred to by these learned authors, and by the citations in that case at p. 300, and *Doe Garnons* v. *Knight* (8). See also *Moss* v. *Barton* (9), *Buckland* v. *Papillon* (10).

The present case is even stronger than *Xenos* v. *Wickham* (7), for this deed was prepared on behalf of the company, and remained in its possession after execution.

Now, if this deed was binding upon the defendant, and irrevocable by him, as I think it was, it has never been repudiated by the company, but, on the contrary, the company has always treated it as valid and binding on both parties.

It is, however, insisted that it was essential that the shares which the defendant agreed to purchase should have been issued and allotted to him, and that this was not done; that at all events they should have been allotted within a reasonable time, and that not having been done, the appellant was at liberty to withdraw his offer, which he did before allotment. Numerous cases were cited laying it down that when an offer to take shares is made, it must be accepted by the company in a reasonable time, an allotment must be made, and notice communicated to the party, and that he may withdraw his offer at any time before allotment. That is undoubtedly so in the case of a mere offer not under seal. What

(7) (1866), L. R. 2 H. L. 296.
(8) (1826), 5 B. & C. 671.
(9) (1866), L. R. 1 Eq. 474.
(10) (1866), L. R. 2 Ch. 67.

we have here, however, is a contract, and the substance of it is to purchase from the company the shares in question, and to pay for them at par when a call or calls are made. The purchase is of a definite number of shares, and not of so many as the company might allot, and, I take it, the defendant would not be bound to take any less number than 200 of each class. The covenant is to take them when issued and allotted. As applied to a fixed quantity of anything, or a fixed number of shares, the word "allotment" can mean nothing more than to give, to assign, to set apart, to appropriate. The word has all these meanings. Nor does the word "issue" in the present case mean the doing of any particular act, and I think "issue" and allotment" taken together mean no more than some signification by the company of its assent that the defendant now was or had become the owner of the number of shares which he agreed to take. All that was required was, in the language of Lord. Cairns, in *Pellatt's Case* (5), "a response," that is, a favourable response, "by the company;" or, as interpreted by Rolt, L.J., "in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer." See *Bird's Case* (11), *In re Richards and Home Assurance Assn.* (12), *per* Montague Smith, J.: "Anything emanating from the company which indicates to the party that the shares have been allotted to him, and which binds them, will be sufficient."

Now what took place here was this. The defendant's subscription was made some time in September, and on the 14th December, the board passed a resolution that the subscribed for preferred stock of the company be called up in full, and that the treasurer notify all subscribers to pay the amount of their subscriptions on or before the 18th January, 1900. On the 16th December, the treasurer wrote to the defendant as follows: "I beg to notify you that the directors have made a call upon the preference shareholders for the whole amount of the stock subscribed by them, this amount to be paid on the 18th day of January, 1900, to the treasurer, W. H. Pearson, jr., at No. 269 Front Street East, Toronto. The amount of preference stock subscribed for by you is 100 shares, and the amount, therefore, payable by you on the above-mentioned date is $2,500." The defendant had subscribed for 100 shares of each class in his own name, and for 100 other shares of each class, adding the words "in trust." So a second letter was written to him on the same day, in the same words, addressed to him with the addition of the words "in trust."

(11) (1863), 4 DeG. J. & S. 200. (12) (1871), L. R. 6 C. P. 591, 595.

Now the resolution of the company, and the letters of the treasurer, having regard to the defendant's contract, can have but one meaning, namely, that the company had appropriated to him 200 preference shares, and called for payment in full. I think it impossible to say that the resolution was not a most unequivocal act issuing and allotting to him those shares.

On the 13th March following, the board passed a similar resolution with respect to the shares of common stock which had been subscribed for, and calling for payment in full on or before the 12th April, and thereupon on the 21st March, letters in the same terms as the former were written to the defendant by the treasurer.

I am of opinion that these resolutions and letters were a sufficient issue and allotment of the shares which the defendant had agreed to take, and that he thereupon became bound to accept and pay for them.

It was not until long afterwards that the defendant repudiated his subscription and his liability as a shareholder, namely, some time in November following. He was repeatedly pressed for payment in May, both by letter and verbally pleading that his money was tied up and asking for time. When in November he assumed to withdraw his offer, the company went through the form of making an allotment of the shares to the defendant, and notified him thereof, and the present action was commenced on the 9th January, 1901.

While I think the resolutions of the 14th December and 13th March were a sufficient issue and allotment within the contract, yet if that were otherwise, the formal allotment in November was in time. I do not see how the defendant could get rid of the obligation of his deed by any mere notice of repudiation and withdrawal. He might demand the shares, offering to pay, and in the event of refusal by the company, he would be discharged, or he might be entitled to relief by action for rescission, after notice calling upon the company within a reasonable time to give him the shares.

Great reliance was placed by Mr. Scott upon the case of *Nasmith* v. *Manning*, in this Court, ultimately decided in the Supreme Court, 5 A. R. 126 and 5 S. C. R. 417. That was an action of *scire facias* by a creditor of a railway company against the defendant as a shareholder of the company, to recover the amount alleged to be due and owing by him upon his shares. There, as here, the defendant had agreed with the company by deed to become the holder of a specific number of shares, and upon allotment to pay calls when made. See the deed, 29 C. P. 36, and 5 S. C. R. at p. 456. The shares were allotted, and the question turned upon

whether any notice had ever been given to or received by the defendant. The subscription was in 1869, and the action was in 1878. The defendant had never acted as a shareholder, had never paid any calls, and it was held by this Court, Moss, C.J., dissenting, that there was no evidence that the defendant had ever received any intimation that he had been accepted as a shareholder, or that shares had been allotted to him, and that the action must fail. It was not a question whether the defendant was bound by his deed and could be compelled to perform it, but whether it had been performed, so that the defendant had become a legal shareholder, for *sci fa.* by a creditor only lies against actual legal shareholders. The judgment was affirmed in the Supreme Court, Ritchie, C.J., and Gwynne, J., dissenting, the Chief Justice holding that on allotment by the company the defendant became a shareholder in fact and in law, and Gwynne, J., that he became such by signing the deed at the request of the company, and also that the findings of fact of the trial Judge ought not to have been disturbed. The other learned Judges, being the majority, proceeded on the ground, which seems to have been altogether a mistake, that when the deed whereby the defendant agreed to take the shares was executed, the company had not yet been incorporated, and did not exist.

That case, therefore, is not one which governs the present, and I am of opinion that the judgment is wrong and ought to be reversed.

Osler, and Moss, JJ.A., concurred.

Armour, C.J.O., took no part.

Lister, J.A., died while the case was *sub judice.*

Subscription Under Seal for Shares. Necessity for Acceptance.

Re PROVINCIAL GROCERS, LIMITED, CALDERWOOD'S CASE.

1905, 10 O. L. R. 705.

MEREDITH, C.J.

Meredith, C.J.:—The question for decision is, whether the respondent was in fact a shareholder in the company in respect of one share of its capital stock of $100.

The respondent by an instrument in writing under seal, bearing date the 29th July, 1903, subscribed for one share in the capital stock of the company, and agreed to pay $100 for it, as follows: "10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors" might deem advisable.

The arrangement made by the respondent was that the company should draw upon him for the ten per cent. payable "on application," and there is a memorandum to that effect on the face of the instrument.

The respondent on the following day, and before anything had been done by the company, wrote to it cancelling his subscription.

The company drew on the respondent for the ten per cent. payable on application, but he refused to accept the draft.

On the 16th September, 1903, the company wrote to the respondent informing him that the bank had notified the company that his draft "for $10 (being ten per cent. of subscription for one share of Provincial Grocers, Limited)" had been returned, and informing him that it was thought that the draft was allowed to come back through error on the part of the respondent, and that the bank had been requested to present it again, and that it was hoped the respondent would protect it,—a vain hope, however, as the respondent again declined to accept.

On the 8th September, 1903, a resolution was passed by the directors in the following form: "That the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment."

The company did not draw on the respondent for the second payment, and the fair inference is, I think, that the respondent was not notified that the share for which he had subscribed was allotted to him.

The name of the respondent is recorded in the book required by sec. 71 of the Ontario Companies Act (R. S. O. 1897, ch. 191), to be kept by the company, as a shareholder, holding one share; and *primâ facie*, therefore, the respondent is a shareholder and the holder of one share.

No further application appears to have been made to the respondent for payment in respect of his share, and there is no evidence that he received any notice of the calls which were subsequently made upon the shareholders, nor any notice of any

meeting of shareholders, one of which at least was held before the winding-up order was made, and it does not appear that after the refusal for the second time to accept the draft for the down payment, he was in any way treated or dealt with as a shareholder.

The position which the respondent occupied was not, in my opinion, that of one who had made a mere offer or proposal to take shares and therefore entitled to recall his offer before it had been accepted. The instrument which he signed was not a mere offer or proposal but a subscription under seal for one share. with a covenant to pay for it in the manner mentioned in the instrument, and his position is therefore to be ascertained according to the principles upon which the Court of Appeal acted in *Nelson Coke and Gas Co.* v. *Pellatt.* (1)

In order, however, that the respondent should become a shareholder, it was necessary that the company should do something equivalent to an acceptance, something either by words or conduct which satisfies the Court that the offer had been accepted to the knowledge of the person who made it.

Of this I am not satisfied, notwithstanding the presumption against the respondent, to which I have referred.

Looking at all the circumstances, the proper inference is, I think, that the company never accepted or intended to accept the respondent as a shareholder unless the down payment of ten per cent. was made, and that, after the definite refusal of the respondent to make that payment, the company made it evident that it had not accepted his offer. The fact that it did not draw upon him for the second payment, that no further effort was made to collect the down payment, that the respondent was not notified of calls or of meetings of shareholders, supports this view.

It follows from what I have said that, even if the other requirement to fix the respondent with the liability of shareholder, *i.e.,* that the company had accepted the offer of the respondent, were satisfied, it is not shewn that the fact that the company had done so was communicated to him.

The appeal will, therefore, be dismissed, with costs to be paid by the appellant to the respondent.

(1) 4 O. L. R. 481.

Subscription for Shares—Right to Withdraw. Conditions of Withdrawal.

In re SCOTTISH PETROLEUM COMPANY, ANDERSON'S CASE.

1881, L. R. 17 Ch. D. 373.

MALINS, V.C.

The Scottish Petroleum Company was formed for the purpose of acquiring some petroleum works near Paris. Capital £30,000, in 3,000 £10 shares. The directors named in the articles of association and in the prospectus were A. H. Gibson, merchant (the chairman), J. M. Ross, merchant, D. Simpson (the vendor), and G. Yooll, manufacturing chemist.

Mr. John Anderson and Mr. James Anderson, on the 8th of November, 1880, each paid a deposit of £50, and applied for fifty shares, having been, as they stated in their affidavit, induced to apply entirely through the names of Mr. Gibson and Mr. Ross appearing on the prospectus as directors.

On the 9th of November, 1880, the solicitors of Mr. Gibson wrote to the solicitors of the company that in consequence of other duties and engagements he would not be able to allow himself to be appointed a director of the company; and on the 12th of November Mr. Ross wrote that in consequence of the resignation of Mr. Gibson he could not allow himself to be appointed a director of the company.

On the 13th of November letters of allotment of fifty shares each were sent to Messrs. Anderson, with a demand for further payment; and with them were letters stating that Mr. Gibson and Mr. Ross had retired from the board of directors and giving the names of two directors substituted for them.

These letters appeared to have reached Messrs. Anderson at Glasgow on the 16th of November, and on the same day each wrote to the secretary of the company stating that it was entirely in consideration of Mr. Gibson and Mr. Ross being directors, and in consequence of Mr. Gibson having stated that he would personally superintend and look after the business, that the application for shares had been made, and requesting the secretary to cancel the application and return the deposit of £50. The directors refused to do this, and a motion was now made on behalf

of Messrs. Anderson that the register of members of the company might be rectified by removing their names therefrom. It was stated at the Bar that 630 shares only had been allotted, but the company was going on.

MALINS, V.C.:—* * * In all these transactions connected with the formation of companies the Court requires that there shall be straightforward, candid conduct; and I think that straightforward and candid conduct required in this case that the persons who applied for shares on the faith of one state of things should have had the option of retiring when a totally different state of things came into existence.

As to the facts there is no dispute. [His Lordship then stated the facts.] Messrs. Anderson said, reasonably enough in my opinion, that they made application for these shares because they knew Mr. Gibson and had confidence in him, and but for the fact of his being the chairman they would not have applied at all. Mr. Glasse, on behalf of the company, says it was a candid proceeding, and that there was nothing dishonest in it. I do not think there was when the prospectus was issued, because it was believed that Mr. Gibson and Mr. Ross would act; but when the company found that these gentlemen would not act they were bound to issue a new prospectus containing other names, and to inform those who had applied for shares that before the allotment was made other directors had been appointed; and then it would be for the applicants for shares to say, under those circumstances, whether they would adhere to their offer or would withdraw it. These gentlemen at once took a business-like view of the matter. They did not comply with the request to pay £2 per share; but on the same day—by return of post—they said, "We took the shares on the faith of Mr. Gibson being chairman and Mr. Ross being a director, we find now that they are out of the concern, and we decline to have anything more to do with it, and beg you to take our names off the list." Could anything be more reasonable, straightforward, or proper? And the directors ought to have said, "We feel that the state of things on the faith of which you made your application, no longer exists, and we give you the option of withdrawing." But instead of that, having issued a prospectus that there would be 3,000 shares, they allotted shares when they had only applications for about 600; and now they persist in holding these gentlemen to their applications for shares. That proceeding on the part of the company is, in my opinion, one of a most unjust character. Mr. Glasse says, however, that I am bound by authority. I should be very sorry if I

were bound by authority, because it would violate every principle of contract. Suppose there is an announcement that a certain state of things exists—for instance, that the public are invited to take tickets for a concert, on the ground that a particular person is going to perform or sing, then, if that person does not perform or sing, the public taking the tickets are entitled to have their money back because the contract is broken.

Now what are the authorities? I have before me the decision of the Master of the Rolls in *Blake's Case* (1), which entirely agrees with my view of the case that under such circumstances a shareholder is not bound. [His Lordship read a great part of the judgment.] The Master of the Rolls puts it on the ground that if a man takes shares in a company believing that A. is a director, and having faith in him, and it turns out that A. is not a director, he is at liberty to repudiate the allotment of shares.

But *Hallows* v. *Fernie* (2) is mainly relied upon. I should be bound by that case if the circumstances were similar. But in that case Mr. Hallows applied for shares in a company with certain gentlemen named as directors; and payment was made by him on application and on allotment. Some of the directors retired. Now when a company is once constituted every man knows that there is a liability to change in the body of directors—you cannot make men perpetual directors; and if in this case Mr. Gibson and Mr. Ross had remained directors after the allotment of the shares, then those who applied for shares must have taken them subject to the chance of the directors changing, as they may change, by death or resignation, and cannot complain if those on whom they relied do not remain in the company. They must take the chance of that. In *Hallows* v. *Fernie,* (2), the allotment was made in May, and the shareholders did not apply to be released until the month of September following—in fact, he did not file his bill until April in the next year, a period of eleven months. Lord Chelmsford, L.C., puts it entirely on the ground that the shareholder had received the allotment and retained the shares. He says (3), "I am quite unable to appreciate the objection founded upon a change in the direction, even if that change had been greater than that of one director for another. If the directors were regularly appointed, and had duly allotted the plaintiff's shares, and he retained them, I do not see upon what principle he can now repudiate the contract, because (as he says) he was led to believe that it would be entered into with other parties than

(1) 34 Beav. 639. (2) Law Rep. 3 Ch. 467.
(3) Law Rep. 3 Ch. 473.

those by whom the allotment was made." I too desire to be understood as saying that if the Andersons, after they had received the letters telling them of the resignation of these two gentlemen, had paid upon their shares, and had adopted the contract, that would have bound them, and it would be in vain for them to apply to be taken off the list. Although the sending of a letter of allotment would generally be binding, still in this case, when a new state of things had arisen, these gentlemen were at liberty to repudiate the contract on that ground. There was nothing dishonest on the part of the directors, but it was their bounden duty to give the applicants the option of withdrawing. It is clear to my mind that the applicants are not bound to take the shares, and their names must be taken off the list of contributories, and the costs must be paid by the company.

NOTE.—*This decision is referred to in the next case. Observe the different circumstances.*

IN RE SCOTTISH PETROLEUM COMPANY.

1882, L. R. 23, Ch. D. 413.

THE COURT OF APPEAL.

NOTE.—**The remarks as to action of a quorum of an incomplete board of directors are retained because of their usefulness, although not following exactly under the present head.**

The Scottish Petroleum Company was incorporated on the 19th of October, 1880, as a limited company, for the purpose of carrying on a manufacture at Paris, and in that month a prospectus was circulated which stated that the directors were A. H. Gibson, J. M. Ross, D. Simpson and G. Yooll, Mr. Gibson being the chairman. These four directors had in fact been appointed by the articles. The capital was stated to be £30,000 in 3,000 shares of £10, of which 1,000 shares were to be allotted to the vendor of the business in part payment of his purchase-money of £18,000 and the rest subscribed for, £1 per share to be paid on application and £2 more per share on allotment.

On the 30th of October, 1880, A. P. Wallace, who had business relations with Mr. Gibson, wrote to him: "I have had a prospectus or two of the Scottish Petroleum Company given me in which I observe your name, and from which I conclude you consider it a

good investment." Gibson on the 1st of November, replied: "I shall be glad to have your application for shares in the Scottish Petroleum Company, it promises to be lucrative."

On the 10th of November, 1880, Wallace sent in an application for ten shares, and paid at the same time the £1 per share payable on application.

On or about the 15th of November, Wallace, who lived in Scotland, received from the secretary of the company a letter dated the 12th:

"Sir,—The directors have in accordance with your application allotted you ten shares in this company, due notice will be given when the certificates are ready. Yours, etc."

Along with the letter of allotment was sent another letter from the secretary in the following terms:

"With reference to the accompanying letter of allotment I beg to remind you that the sum of £2 per share is payable on allotment, and I shall be glad if you will on receipt of this remit to the company's bankers a cheque for the amount due in respect of your application. I have to inform you that since the date of your application for shares Mr. A. H. Gibson and Mr. J. M. Ross have retired from the board of directors, the former owing to pressure of private business, and the latter owing to Mr. Gibson's resignation. M. J. Courcier, of Belincourt, near Paris, an applicant for shares, has been elected a director in the place of Mr. Ross, and other directors will be elected at the first general meeting of the company."

Wallace consulted Mr. Gibson about the reasons for his retirement, and not receiving any answer which he considered satisfactory, he, on the 27th of November, 1880, wrote to the secretary stating that on the ground of the retirement of Messrs. Gibson and Ross he withdrew his application for shares and requested the return of the £10 paid on application. On the 3rd of December the solicitors of the company wrote to say that the directors could not release Wallace from his contract on the ground alleged, and that they requested him to pay the amount payable on the allotment of his shares. On the 7th Wallace replied, referring to his letter of the 27th of November, and expressing the hope that in the interests of the company and all concerned they would advise the return of the £10. No reply was received to this letter, but on the 8th the secretary wrote to Wallace asking for payment of the £20 payable on allotment. Wallace on receipt of this letter, wrote on the 10th of December,

1880, a letter in reply referring to his letter of the 27th of November, and asking for the return of his £10. Here the correspondence ended.

On the 3rd of February, 1881. Vice-Chancellor Malins made an order for removing the name of a shareholder named Anderson from the register, on the ground that he had taken shares on the faith of Gibson and Ross being directors (1). On the 8th of February, 1881, the company gave Wallace notice of a general meeting to be held on the 17th of February, 1881, and on the 7th of May, 1881, gave him notice of another general meeting. On the 27th of May, 1881, an order was made for winding-up the company. There had not been any communication between Wallace and the company since the letter of the 10th of December, 1880, except the service of the above notices of meetings; and Wallace had taken no step in the matter. His name was placed on the register of shareholders soon after the allotment.

In order to shew the ground on which one of the questions argued was raised, it is necessary to state some further facts. The first meeting of directors was held on the 12th of November, 1880; Yooll and Simpson were present. A letter of the 9th of November was read from Gibson's solicitors stating that in consequence of other duties and arrangements he could not allow himself to be appointed a director, and a letter of the 12th of November from Ross was read to the effect that in consequence of Gibson's resignation he could not allow himself to be appointed a director. M. Courcier of Paris was elected a director in the place of Gibson. The two directors present proceeded to allot shares, and the allotment to Wallace was then made. The question whether these two directors out of a total of three were competent to act, turned on the following provisions in the articles:

"66. The number of directors shall not be less than four or more than seven, unless a general meeting shall otherwise prescribe."

"67. The first directors of the company shall be A. H. Gibson, J. M. Ross, D. Simpson, and A. G. Yooll."

"82. Any casual vacancy occurring in the board of directors by death, resignation, or otherwise, may be filled up by the directors, but a person so chosen shall only retain his office so long as the vacating director would have retained the same if no vacancy had occurred."

(1) 17 Ch. D. 373.

"83. The continuing directors may act notwithstanding any vacancy in the board."

"84. The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. * * * Three directors may at any time summons a meeting of directors, and until otherwise determined two directors shall be a quorum at any meeting."

"88. All acts done by the board or committee of the directors shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any of the directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

Wallace and some other persons who had taken shares at the same time with him applied by summons to have their names taken off the list of contributories on the ground that they had taken their shares on the faith of Gibson and Ross being directors, which they were not at the time of the allotment.

KAY, J., refused the application.

IN THE COURT OF APPEAL.

BAGGALLAY, L.J.:—On the 27th of May, 1881, an order was made for winding-up the Scottish Petroleum Company, Limited. At the commencement of the winding-up the names of R. Black, J. Calder, F. Graham, and A. P. Wallace, were on the register of members of the company, and they were accordingly placed by the official liquidator on the list of contributories. On the 22nd of July, 1882, they applied to Mr. Justice Kay to remove their names from the list, and from the dismissal by him of their application the present appeal is brought.

The general rules by the application of which questions similar to those which arise upon the present appeal must be determined are well known, and no dissent from or modification of such rules has been suggested in the course of the arguments which have been addressed to us. They may be concisely stated as follows:—

1. Every person who has agreed to become a member of a company, and whose name has been entered on the register of members, is liable as a contributory in the event of the company being wound up. This is, in substance, the combined effect of the 23rd, 38th, and 74th sections of the Companies Act, 1862.

2. But the proposition thus generally stated is subject to the application of the well-recognized rule in Equity that a person who has been induced to enter into a contract by the fraudulent conduct of those with whom he has contracted is entitled to rescind such contract provided he does so within a reasonable time after his discovery of the fraud. In such cases the contract is voidable, not void.

3. And this last-mentioned rule, in its application to contracts to take shares in a company which is subsequently ordered to be wound up, has been modified to this extent, that the contract must be avoided, or that must be done which is recognized as equivalent to avoidance, before the commencement of the winding-up. This last rule has been established by a series of well-known cases, to some of which I shall have occasion to refer presently. The grounds upon which it has been held that equities which would be sufficient as between the shareholders and the company cannot be set up against the creditors or co-contributories are fully explained in those cases. Whether that which has been done in any particular case ought to be regarded as equivalent to an avoidance of a voidable contract is a question the solution of which must depend upon the circumstances of each case.

In that with which we have now to deal it has been contended on the part of the appellant:

1. That there was no binding agreement on the part of any of the appellants to take shares in the company. If this be so, their names were improperly entered on the register of members, and they are entitled to have their names removed from the list of contributories.

2. That if any such agreements were entered into by the appellants they were induced to enter into them by the fraudulent misrepresentations of the directors, and that the contracts were consequently voidable at the instance of the appellants.

3. That that which was done by the appellants before the commencement of the winding-up of the company was equivalent to an avoidance of the contracts so entered into by them.

The cases of the four appellants are substantially the same, the differences, which are in detail only, being but trifling. Mr. Haldane very fairly admitted at the commencement of his argument that unless he could succeed in supporting the case of Mr. Wallace he should hardly hope to support that of the other appellants, and to the case of Mr. Wallace he first and chiefly directed our attention. I will adopt the same course.

Mr. Haldane's first contention was that there was not at any time a concluded agreement on the part of Mr. Wallace to take shares in the company. To constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made. It is not disputed that Mr. Wallace applied for ten shares, but it is contended on his part that there was no valid allotment to him, and that, even if there was a valid allotment, the fact of the allotment having been made was not effectually communicated to him.

In support of the first point that there was no valid allotment, the argument was as follows: The articles provided that the number of directors should not be less than four or more than seven; and they appointed in the first place only the minimum number. It is contended, and perhaps rightly, on behalf of Mr. Wallace that two of these four directors had ceased to be directors before the allotment was made, and it is also contended that though by the articles two directors form a quorum when the board is duly constituted there could not be a quorum capable of transacting business when the board of directors was not filled up to the minimum number. I assume that the retiring directors had ceased to be directors, and if that be so, the board was not made up to the minimum number. Still I think that, having regard to article 83, the objection cannot be maintained. It is urged that this article can only apply when the number of directors is more than four, but I see no reason for adopting that view. The number of directors never exceeded four, and there might be a vacancy, in which case, according to the terms of Art. 83, the continuing directors could act. A quorum of two was therefore competent to allot shares.

Then, assuming that there was power to allot, was an allotment communicated to Mr. Wallace? The allotment purported to be made on the 12th of November, 1880, and on the same day the secretary addressed to Mr. Wallace the following letter: "The directors have in accordance with your application allotted to you ten shares in this company. Due notice will be given when the certificates are ready." This taken alone is a clear notice of allotment. The argument for Mr. Wallace is founded on this, that the effect of the contemporaneous letter from the secretary to Mr. Wallace is to introduce a new term, so that taking the two letters

together there was no unconditional acceptance by the directors of Mr. Wallace's offer to take shares. Mr. Wallace says, "I understood that four specified persons were directors, you inform me that two of them are not, so I consider that you have made no good allotment to me." I cannot take that view. It is suggested that this contemporaneous letter was written for the purpose of allowing the allottee to withdraw his application, and at first I was inclined to that view; but I do not on further consideration think that this was the intention. A notice of allotment was sent, and at the same time a piece of information was given which might be of importance or interest to the allottee. It may be that the retirement of the directors gave the allottee a right to rescind the contract, as I think it did; but the present question is, whether it introduced a new term so as to entitle the alleged allottee to say that there was no contract at all. It seems to me that there was a complete acceptance, though accompanied by a communication of a piece of information which might entitle the allottee to repudiate the allotment, and I therefore think that the argument of there having been no contract fails.

Assuming, then, that there was a contract, Mr. Wallace contends that he was entitled to be relieved from it on the ground of misrepresentation, and on this point I am in his favour. Apart from the decision of Vice-Chancellor Malins in *Anderson's Case* (2) it appears to me that the representation as to the persons who were to be directors was very material. Here was a company formed for carrying on a business in Paris, and four directors were named, Gibson and Ross, resident in London, a third in Paris, and the fourth in Fifeshire. It is clear that the appellants relied on the fact of Gibson being a director, and as to Mr. Wallace the case goes further, for he corresponded with Gibson as to the company. I do not say that this correspondence is to be taken into consideration as regards there having been a misrepresentation, but it supports the view that Mr. Wallace applied for shares on the faith of Gibson being a director. I do not go further into this, for Anderson applied to have his name taken off the register on the ground of the change in the body of directors, and Vice-Chancellor Malins decided that it must be taken off, for that the misrepresentation was such as entitled him to rescind, and that as he had applied within a reasonable time his name must be taken off. I am therefore with Mr. Haldane in the contention that there was a misrepresentation which made the contract voidable.

(2) 17 Ch. D. 373.

Then the question is, had Mr. Wallace done that which is equivalent to avoiding the contract before the winding-up commenced. The general principles applicable to these cases are to be gathered from *Oakes* v. *Turquand* (3), *Kent* v. *Freehold Land Company* (4), and *Reese River Silver Mining Company* v. *Smith* (5). In *Oakes* v. *Turquand* no step was taken till after the winding-up had commenced, and the applicant was held to be too late. In *Kent* v. *Freehold Land Company* (4), a bill was filed after the commencement of the winding-up and was held too late. In *Reese River Silver Mining Company* v. *Smith* (5), a bill by the shareholder to have his name removed was filed before the petition to wind up, and he was held entitled to relief. These cases shew that an equity which would entitle a shareholder to be relieved from shares in a going company will not entitle him to relief if brought forward for the first time after the winding-up has commenced.

A series of other cases has somewhat narrowed the application of this rule. Some of the most interesting and instructive are the three cases in *In re Estates Investment Company*. In *Pawle's Case* (6), Ross, who was acting in concert with ten other shareholders, filed a bill to have his name removed from the register on the ground of misrepresentation, and it was agreed with the company that the other ten should not be prejudiced by their not taking proceedings pending the suit. A decree was made for removing Ross's name, and pending an appeal from this decree an order was made for winding-up the company. The decree was affirmed. Pawle, one of the ten, claimed to be excluded from the list of contributories, and it was urged that he was too late; but it was held that the agreement with the company was sufficient to prevent the application of the rule and he was excluded from the list. *McNeill's Case* (7) went rather farther. McNeill had nothing to do with Ross's suit or the arrangement, but he had expressly repudiated his shares and refused to pay calls, and the directors had given notice to the shareholders that legal proceedings against shareholders who refused to pay calls would be suspended till Ross's suit was decided. It was held that he was entitled to relief. But in *Ashley's Case* (8) it was held that Ashley, who had not expressly repudiated his shares, was in a different position, for he had done nothing to repudiate his shares before the winding-up, and must be a contributory.

(3) Law Rep. 2 H. L. 325.
(4) Ibid. 3 Ch. 493.
(5) Ibid. 4 H. L. 64.
(6) Law Rep. 4 Ch. 497.
(7) Ibid. 10 Eq. 503.
(8) Ibid. 9 Eq. 263.

The cases appear to establish that to enable a shareholder to escape there must before the commencement of the winding-up be a repudiation of the shares, and that it must be followed up by active steps to be relieved from them, unless there is some agreement with the company which dispenses with the necessity of proceedings being taken by this particular shareholder.

That mere repudiation not followed up by anything more is insufficient was decided in *Hare's Case* (9). It was a hard case, for there had been a compromise by which the names of the repudiating shareholders were to be removed, but Hare was not a party to these proceedings, and nothing was proved as regards him except that he had expressly repudiated his shares before the commencement of the winding-up. It was held that he was a contributory.

In the present case there was no doubt an express repudiation, for Mr. Wallace, on the 27th of November, 1880, wrote to withdraw his application for shares on the ground of the change in the board, and requested a return of his deposit. This was met by a demand of the £2 per share payable on allotment. The delay of a fortnight in repudiating the shares makes it, to my mind, doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in *Central Railway Company of Venezuela* v. *Kisch* (10). But where, as in the present case, the shareholder is at once fully informed of the circumstances, he ought to lose no time in repudiating. But suppose the repudiation had been made on the next day, what has Mr. Wallace done since? His repudiation was met by a letter insisting on retaining him as a shareholder, and claiming the allotment money. He took no further step. If the matter rested there he is clearly within *Hare's Case* (9).

It was urged that both parties treated *Anderson's Case* (2), which was decided on the 3rd of February, 1881, as deciding the matter in dispute between them. But there was no communication between Mr. Wallace and the company on the subject. The company sent him notices of meetings, one of which was sent soon after the decision in *Anderson's Case* (2), and the other subsequently, thus treating him as a shareholder and keeping him at arm's length. Having regard to all these circumstances, I am of opinion that Mr. Wallace did not before the winding-up do what, according to the circumstances, is equivalent to an avoidance of the contract, and he is practically in precisely the same

(9) Law Rep. 4 Ch. 503. (10) Law Rep. 2 H. L. 99.

position as the applicant in *Hare's Case* (9). The appeal will therefore be dismissed. It is unnecessary to refer to the case of the other appellants, as their position is clearly less favourable than that of Mr. Wallace.

LINDLEY, L.J.:—I am of the same opinion, and shall add a few remarks, for after the elaborate argument of Mr. Haldane I thought it desirable to look through the cases.

The first question is, whether the allotment was good for anything. It is contended that there were no directors who could make an allotment, because there was not a board of four; but looking at articles 66, 67, 83, 84 and 88, I think this objection cannot be maintained. At the time of this allotment, however, there was a material change in the body of directors. The secretary acting honestly and fairly, drew the attention of the allottees to the fact. Mr. Haldane argued that this change made the contract void, and referred to *Traill* v. *Baring* (11). I think that case does not bear out his proposition, and goes no further than to shew the contract to be voidable.

There was then an application by Mr. Wallace and an allotment of shares to him under a changed state of circumstances, which entitled him to repudiate the shares. He did repudiate them by a very clear letter. In the meantime he had been placed on the register of shareholders. If we could decide the case on the principles generally applicable to contracts, Mr. Wallace would be entitled to relief. But in the case of shares in a company the shareholder must, before the commencement of the winding-up, have done something to alter his *status* as member. Mr. Wallace by letter repudiated his shares and asked for a return of his deposit, but he did nothing else. The company refused to accede to his renunciation of his shares. A shareholder named Anderson took proceedings to be relieved from his shares on the same ground as that alleged by Mr. Wallace, and was held entitled to relief. The company was then a going concern. I assume that decision to have been right, but there is no evidence of any agreement that the company should be bound as between them and all the other shareholders by the result of that case. There may have been a sort of vague understanding that it would be so, but there is nothing like an agreement to stand or fall by the result of *Anderson's Case* (2), and after that decision the company continued to treat Mr. Wallace as a shareholder by sending him notices of meetings.

(11) 4 D. J. & S. 318.

As regards the cases, the present is not like *Oakes* v. *Turquand* (3) or *Ashley's Case* (8), for in neither of those cases was there any repudiation at all before the commencement of the winding-up. But in *Kent* v. *Freehold Land Company* (4) there was. Lord Cairns there begins by saying that he cannot see any distinction between that case and *Oakes* v. *Turquand* (3). He cannot have overlooked the fact that there was in this case a repudiation before the winding-up and that in the other there was not; and he must have meant that a mere repudiation not followed before the winding-up by any steps to have the name taken off the register did not make any substantial difference. This is illustrated by *Pawle's Case* (6), and the point arose more distinctly in *Hare's Case* (9), where a shareholder who had repudiated his shares before the winding-up, but had taken no steps to have his name removed from the register, was held to be a contributory.

If we look at these cases to see what principle is to be deduced from them, I think we find that the shareholder who seeks to be discharged must have done two things: he must have repudiated the contract and have got his name taken off the register, subject to the qualification that if he has before the commencement of the winding-up taken proceedings to have his name removed, that will be sufficient. There is a further encroachment on this rule, namely, that if one shareholder commences a litigation to have his name removed, and there is an agreement between the company and other repudiating shareholders that all the cases shall stand or fall by the result of his litigation, then if that case is decided in favour of the litigant shareholder the others will be relieved: *Pawle's Case* (6). But there is no authority that can be relied on for carrying the modification of the rule any further. I say none that can be relied on, for there is a case, *Fox's Case* (12), which it is difficult to reconcile with the principle established by *Oakes* v. *Turquand* (3) and *Kent* v. *Freehold Land Company* (4). The general principle was carried out in *Burgess's Case* (13), which is an important case, because there was money in hand sufficient to pay the creditors, so it might forcibly be urged that the doctrine of *Oakes* v. *Turquand* (3) did not apply; but the Master of the Rolls held that as the shareholder had not taken steps before the winding-up to alter his *status* as between himself and the other shareholders he was bound. The rule is, that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding-up; but this rule is subject to the qualification, that

(12) Law Rep. 5 Eq. 118. (13) 15 Ch. D. 507.

if one repudiating shareholder takes proceedings the others will have the benefit of them if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings, but not otherwise.

I am of opinion on these grounds that the appeal must be dismissed, and I am not sure that I should not have come to the same conclusion on the ground that Mr. Wallace was guilty of laches in not repudiating earlier, but it is not necessary to resort to that ground.

FRY, L.J.:—The questions for decision are (1), was there a concluded contract by Mr. Wallace to take shares? (2) If there was, had he a right to avoid it, and did he avoid it?

As regards the first point, I agree in the conclusion that the two directors were competent to act. Then did they unconditionally accept Mr. Wallace's offer, or did they by their answer introduce a new term? This is a question of the construction of the letters, and I think that on their true construction a contract was entered into. It is only by laxity of language that a mere statement of fact can be called the introduction of a new term. I am of opinion, therefore, that there was a concluded bargain.

Had then Mr. Wallace a right to repudiate this bargain by reason of the change of circumstances? I see no reason to dissent on this head from the opinions expressed by Lord Justice Baggallay. I agree with the observations of Lord Justice Turner in *Traill* v. *Baring* (11): "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made." I think then that here the communication of the alteration of circumstances gave Mr. Wallace a right to repudiate or not as he thought fit. Did he repudiate? In the case of ordinary contracts if they are voidable an express repudiation avoids them, and if this had been the case of an ordinary contract I think that Mr. Wallace's letter of the 27th of

November would have been a sufficient repudiation, supposing it to have been sent in time. Whether it was sent in time we need not determine, for this is not the case of an ordinary contract, but of a contract to take shares, which stands on a different footing. As regards such contracts the Legislature has interposed, and has provided that they shall be made known in a particular way to shareholders and creditors: notice of them is given to the world. Now the general principle is that no contract can be rescinded so as to affect rights acquired *bonâ fide* by third parties under it. It it true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern. So that although in the case of ordinary voidable contracts simple repudiation is enough, there must in the case of a voidable contract to take shares be repudiation and something more before the winding-up commences.

What more then is enough? If the name is removed, that is of course enough. It is enough if before the commencement of the winding-up the shareholder takes proceedings to get his name removed and duly prosecutes them. How the case would stand if they were not duly prosecuted it is unnecessary to decide. It has also in some cases been held that something short of this will do, but I agree with Lord Justice Lindley that these are encroachments upon the general rule, and I do not think that they ought to be extended.

In the present case Mr. Wallace after his letter of the 27th of November, 1880, did nothing. He neither obtained the removal of his name from the register, nor took any proceedings to get it removed. I am of opinion therefore that though he had repudiated the contract by letter in a way which in the case of an ordinary contract would have been sufficient, he having done nothing more, has not done what is necessary to enable him to get rid of his shares, and that he is a contributory.

Contract on Behalf of Intended Company.

NATAL LAND AND COLONIZATION COMPANY, LIMITED v. PAULINE COLLIERY AND DEVELOPMENT SYNDICATE, LIMITED.

1903, 73 L. J. P. C. 22.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Appeal from a decree of the Supreme Court of Natal. The facts are stated in the judgment.

Lord Davey delivered the judgment of their Lordships:

The appellants are an incorporated joint-stock company, having their head office in London. Prior to and in the month of December, 1897, a Mr. Rycroft was their general manager in Natal under a power of attorney dated October 26, 1888, by the terms of which he was empowered to sell and lease the company's lands in the colony and to make contracts for these purposes. On December 9, 1897, Rycroft, on behalf of the appellants, made a contract with a Mrs. de Carrey respecting the coal-mining rights in 3,000 odd acres of land belonging to the appellants and known as the Coal Company's lots. The terms of this agreement are contained in seven letters extending from November 30 to December 9, 1897, between Rycroft and Messrs. Shepstone, Wylie & Binns, then acting as solicitors for Mrs. de Carrey. The material terms are as follows: First, Mrs. de Carrey was to have an option—that is, a right of prospecting for coal, for six months from December 20, 1897, with power to extend the option for a further period of three months; secondly, the option was not assignable; thirdly, that Mrs. de Carrey should have the right, during the continuance of the option, to call for a lease of the coal-mining rights for a term of three years, subject to payment of certain rents and royalties, with power to extend the term to thirty-one years; fourthly, Mrs. de Carrey was to have the right to sell the lease to a joint-stock company fulfilling certain specified conditions; fifthly, Mrs. de Carrey was to pay or hand over to the appellants 25 per cent. of the value received from the sale of the lease, in shares or cash, or both, at the option of the appellants; sixthly, Mrs. de Carrey was to pay the appellants £100, to be forfeited in case the lease was not taken up, but to be repaid on compliance with certain conditions.

By an agreement dated December 22, 1897, and expressed to be made between William Louch, "in his capacity as a provisional director of the Pauline Colliery and Developing Syndicate about to be registered * * * under the laws of the" South African "Republic," of the one part and Mrs. de Carrey of the other part, Mrs. de Carrey sold and purported to assign to Louch all her interest in (*inter alia*) the above option in consideration of £300 cash and 10,000 shares in the syndicate. Mr. Rycroft was not informed of this agreement or of the assignment purported to be made by Mrs. de Carrey, and did not in fact know of it until December 17, 1898.

On December 29, 1897, the solicitors acting for Mrs. de Carrey wrote to Rycroft requesting him, as (it was stated) Mrs. de Carrey was really acting as the nominee of the syndicate, to insert a new clause in the agreement giving her the right to cede and transfer all her rights in the option to the Pauline Syndicate on the condition that the syndicate should assume all the rights and obligations to the appellants under the agreement. And on the following day Rycroft wrote to the solicitor a letter containing the following passage: "I beg to say that it was understood at the time of making the agreement with Mrs. de Carrey that she and the original (or parent) Syndicate were one and the same, therefore, I could not have any objection to the Pauline Colliery and Developing Syndicate being substituted under section 4 of your letter of the 8th instant (Mrs. de Carrey's consent to the alteration, you assure me, has been obtained) for Mrs. de Carrey."

At this time Rycroft was not aware of the assignment to Louch which had already been made by Mrs. de Carrey by the agreement of December 22, 1897, and he did not know what was the constitution of the so-called syndicate, or who were the persons who composed it, or what person he had agreed to substitute for Mrs. de Carrey. Their Lordships, however, will assume that the substitution was within his powers. The respondent company was not incorporated until January 22, 1898, on which date it was registered as a joint-stock company with limited liability at Pretoria, under the laws of the late South African Republic. The £100 payable under the agreement was paid to Rycroft by the unincorporated syndicate before the incorporation of the respondent company. This sum was subsequently (on November 25, 1898), repaid by Rycroft to one Thurston by the order of Mrs. de Carrey.

On January 31, 1898, Rycroft wrote to the solicitors of Mrs. de Carrey and the syndicate a letter containing a copy of a telegram which (he says) he had that morning received from the appellants'

London office. The telegram was as follows: "Umhlali matter was not in accordance with instructions. Do nothing further. Inform Binns must wait Board's orders."

Binns was a member of the firm of Shepstone, Wylie & Binns, the solicitors for Mrs. de Carrey, the unincorporated syndicate, and the respondent company. Rycroft's comment on this telegram in his letter was, "I do not know what particular part of our negotiations this may refer to, but if anything more is required of me by the Pauline Syndicate or Mrs. de Carrey I am bound by these instructions to await orders from the Board."

Their Lordships are of opinion that after this date Rycroft had no authority to make a new agreement, or to vary the existing agreement, or in any other way to bind the appellants in the matter.

The term was extended to September 30, 1898, as provided in the agreement. The respondents had been engaged in boring for coal on an adjoining property and did not prospect or bore for coal on the property of the appellants till shortly before the expiration of the extended term, and very little work appears to have been done. But on September 15, 1898, the secretary of the respondents, by a letter of that date, informed Rycroft that his board was given to understand that his syndicate had struck a 3 ft. 8 in. seam of coal on the appellants' property at a depth of 293 feet, and claimed a lease to the respondents on terms of the correspondence between Rycroft and Messrs. Shepstone, Wylie & Binns, which they alleged constituted an agreement between the appellants and the respondents. Rycroft, on the same day, answered the letter, stating that he should send a copy of it to the London secretary of his company to be laid before the board for their instructions. On December 12, 1898, Rycroft, acting under the instructions of the appellants' board, declined to entertain the claim, but offered to consider an application for a lease at the same rent and royalties, but subject to certain conditions. This offer was not accepted.

On May 30, 1899, the respondents commenced the present action against the appellants for specific performance of the agreement contained in the seven letters dated November 30 to December 9, 1897, or in the alternative for damages. In their declaration the respondents alleged that on December 22, 1897, they acquired all the interest of Mrs. de Carrey in the agreement, but did not allege any other assignment to them or title to the benefit of the agreement.

The appellants in their plea to the declaration averred that there was no contract between the respondents and themselves, and alleged that the agreement to substitute the syndicate for Mrs. de Carrey was obtained from Rycroft by misrepresentation, the misrepresentation charged being that Mr. Binns and Louch had represented that Mrs. de Carrey had been acting for the syndicate all through the negotiations, whereas the syndicate or Louch had purchased the benefit of the agreement from her for a large sum.

The Court, consisting of Mr. Justice Finnemore and Mr. Acting Justice Beaumont, decided in favour of the respondents on both points, and by their judgment of May 29, 1902, decreed specific performance of the agreement with costs. On the question of privity of contract they seem to have held that a new contract on the terms of the old one had been made between the appellants and the respondents. The acts of part performance which were relied on by the learned Judges as evidence of such new contract were the occupation and working of the land in question by the respondents, the expenditure of money on the faith of the agreement, and the acceptance by the appellants of the payment of £100 as a guarantee for prospecting operations. This sum, however (as already stated), was in fact paid before the incorporation of the respondents.

Their Lordships do not think it necessary to say whether the agreement was or was not voidable on the grounds alleged or on other grounds appearing in the correspondence, because they are clearly of opinion that there was no contract between the appellants and the respondents. The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated syndicate, who were the promoters of the respondent company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from *Kelner* v. *Baxter* (1) downwards. But the facts may shew that a new contract was made with the company after its incorporation on the terms of the old contract. The circumstances relied on for that purpose in the present case are not, in the opinion of their Lordships, necessarily referable to, and do not necessarily imply, a new contract with the respondents. But a conclusive reason which negatives any new contract is that Rycroft, by whose agency the new contract must be supposed to have been made, had no power or authority after January 31, 1898, to make such a contract on

(1) [1866] 36 L. J. C. P. 94: L. R. 2 C. P. 174.

behalf of the appellants, and his want of authority was known to the solicitors acting for the respondents. He was not either the actual or the ostensible agent for that purpose of the appellants.

Their Lordships will therefore humbly advise his Majesty that the judgment of May 29, 1902, ought to be reversed, and that, instead thereof, judgment ought to be given for the defendants in the action with costs. The respondents will also pay the costs of this appeal.

CRANE v. LAVOIE.

1912, 22 Man. Rep. 330.

THE MANITOBA COURT OF APPEAL.

The plaintiffs set up that on or about the 10th May, 1910, the defendants F. X. Lavoie and D. Fournier, purporting to act as the president and manager respectively of the Fournier Company, Limited, signed six promissory notes for $200 each, dated 10th May, 1910, payable 2, 3, 4, 5, 6 and 7 months, respectively, after date, and one otherwise similar note for $115.79, the notes being signed as follows:

"The Fournier Co., Ltd."
"F. X. Lavoie, President."
"D. Fournier, Manager."

That at the time of the making of the said notes there was no such company, that the notes were not paid at maturity and still remained unpaid.

The defence set up was that while the company was in formation, and while the petition for incorporation was being signed, plaintiffs requested defendants to sign the paper writings on the forms which are usually used for promissory notes, as a provisional agreement, to be later on ratified by the company, and there was no intention at the time to bind either the plaintiffs or the defendants, and the same was subsequently ratified by the company, for the incorporation of which a petition was filed with the Provincial Secretary on the 13th May, 1910, and at the first meeting of the directors and shareholders the notes were duly assumed by the company.

The case was tried before Robson, J., who gave judgment for plaintiffs for the amount represented by the seven notes mentioned in the statement of claim with interest at 5 per cent. per annum from the maturity thereof respectively.

Defendants appealed.

HOWELL, C.J., and RICHARDS, J., gave reasons for the dismissal of the appeal.

PERDUE, J.A.:—I agree with the finding of the learned trial Judge that there was sufficient consideration for the making of the notes in question. The plaintiffs delayed their remedies against Fournier & Laplante, the original debtors, and permitted the assets of that firm to be handed over to the Fournier Co., Limited, which was to assume the liabilities of Fournier & Laplante. The plaintiffs not only granted the request for forbearance as against the original debtors, but also changed their position by permitting the transfer of assets.

I also agree in the finding that the evidence does not establish that Thompson, the plaintiffs' accountant, had knowledge that the company had not been incorporated when the notes were delivered to the plaintiffs. On the other hand, information as to the condition of the incorporation proceedings was within the knowledge of the defendants and the other incorporators, and the plaintiffs had a right to assume that the officers of the company would not make and issue notes of the company before it was incorporated.

It is claimed that defendants are liable either as makers of the notes or for breach of warranty as to the existence of the company and the defendants' authority to sign the notes on its behalf.

In considering the first of these two questions it is essential that the form of the notes and the manner in which they are signed should be carefully scrutinized. Whether the defendants have sufficiently excluded their personal liability and shown that they signed on behalf of another party, must be gathered from what appears on the face of the notes: *Leadbitter* v. *Farrow* (1). Extrinsic evidence cannot be given to show in what capacity the maker intended to sign: *Thomas* v. *Bishop* (2), *Rew* v. *Pettet* (3), *Kelner* v. *Baxter* (4) *Brown* v. *Holland* (5), *Hagarty* v. *Squier* (6). All the notes sued upon in this action are in similar form, the only difference being in the time of their maturity. The following is a copy of one, which will serve for all:

(1) 5 M. & S. 349.
(2) 2 Stra. 955.
(3) 1 A. & E. 196.
(4) L. R. 2 C. P. 174.
(5) 9 O. R. 48.
(6) 42 U. C. R. 165.

"$200. St. Boniface, May 10th, 1910.

"Two months after date we promise to pay to the order of Crane & Ordway Co. at the Northern Crown Bank here the sum of two hundred dollars. Value received.

The Fournier Co., Ltd.
F. X. Lavoie, Pres.
D. Fournier, Manager."

At the time the notes were signed the Fournier Co., Limited, had not been incorporated. The letters patent incorporating that company bear date 2nd June, 1910. Section 52 of the Bills of Exchange Act, as made applicable to promissory notes by section 186, declares that, where a person signs a promissory note as maker "and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon: but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." Sub-section 2 provides the rule that is to be followed in determining the capacity in which the signer of the note has placed his signature upon it. That sub-section enacts that, in determining whether a signature on a bill or note is that of the principal or that of the agents by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

The notes in question were signed by the defendants. The addition of the word "President" or the word "Manager" after one of the signatures is not in itself sufficient to exclude the personal liability of the party signing. The note commences with the words "We promise," which would be quite appropriate in the case of a note intended to be the note of two or more parties. As has already been pointed out, no explanation, outside what appears on the note, is permissible to show in what character the parties signed. But it is urged that the name of the Fournier Co., Ltd., appears above the individual signatures and it is argued that the natural inference is that the defendants were signing as president and manager of that company, and not as actual makers. It appears to me that one fact which confronts the defendants at the very threshold of the case is fatal to the above contention. There was no such company or any such entity as the Fournier Co., Limited, when the notes were signed. Where there was no principal there could be no agent. Where there was no company there was no president or manager. Then, in order to give any validity to the document, *ut res magis valeat quam pereat*, we must assume that the parties signing it made themselves per-

sonally liable. Otherwise, there being no principal who can be made liable, the note would have no validity and would become a mere meaningless paper.

The principle upon which this proposition rests is well exemplified in *Kelner* v. *Baxter* (4). In that case a proposal in writing was made by the plaintiff to A. B. and C. on behalf of the proposed Gravesend Royal Alexandra Hotel Co. for the sale of certain goods. The proposal was accepted by "A. B. and C. on behalf of the Gravesend Royal Alexandra Hotel Co." At the time of the acceptance there was no such company in existence. The Court unanimously held that A. B. and C. were personally liable. Erle, C.J., in giving judgment (p. 183) said:

"I agree that, if the Gravesend Royal Alexandra Hotel Co. had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby."

So also, in *Thomson* v. *Feeley* (7), Wilson, J., gave expression to the same principle in these words:

"It is established that, although a person signs an agreement on behalf of a company, and the company has no existence at the time but is only projected or in prospect, he is personally liable, because there is no principal whom he does or can represent, and the agreement would be wholly inoperative if it were not to be binding on the person who signed it." See also *Rew* v. *Pettet* (3).

This being the law in respect of ordinary contracts, it applies, by the effect of the sub-section of section 52 of the Act, *a fortiori* to the case of promissory notes. "The construction most favorable to the validity of the instrument shall be adopted." Therefore, in the present case, if the defendants are not held liable personally, the instruments bind no one and fall to the ground as worthless. I think the construction necessarily to be adopted in this case is to hold the defendants liable as makers of the notes.

The case of *Kelner* v. *Baxter* (4), above referred to, is also authority for the proposition that a subsequent ratification by the

(7) 41 U. C. R. 229, at p. 234.

company, after it came into existence, did not relieve the defendants from the liability that had attached to them upon the making of the instrument. The contention, therefore, founded on the resolution of the company after incorporation to assume and pay the notes, that the plaintiffs had, or could have, obtained what they bargained for (the promise of that company), cannot avail the defendants.

I think the defendants might also be made liable for breach of their implied warranty that the Fournier Company, Limited, was incorporated and in existence and that they had the power to sign the notes on behalf of that company. A question was raised as to what would be the measure of damages accruing to the plaintiffs in such a case. I do not think it necessary to decide that question. I prefer to decide this case simply upon the ground that the defendants are liable as makers of the notes.

The appeal should be dismissed with costs.

CAMERON, J.A., and HAGGART, J.A., delivered judgments with a like effect.

Agreements for Payment of Shares Otherwise Than in Cash.

The form of payment for shares has received varying treatment in the different jurisdictions. Under the English Act of 1867 every share was to be deemed to be issued subject to payment of the whole amount in cash unless otherwise determined by contract in writing filed with the Registrar of Companies at or before the issue of the shares. This provision was repealed and there was imposed an obligation on the company to make a return disclosing contracts for the issue of shares otherwise than for cash. The original English requirement was applied in some Canadian jurisdictions, but there have been like departures, some legislatures going so far as to remove all necessity of filing such contracts. The Courts exercise a beneficial jurisdiction to say whether contracts for satisfaction for shares in kind are valid and binding under the principles of the cases now quoted.

In re WRAGG, LIMITED.

1897, L. R. 1 Ch. 796.

THE COURT OF APPEAL.

This was an application by the liquidator in the winding-up of the company for a declaration that certain shares in the company held by E. J. Wragg and J. B. Martin and registered in their names as fully paid up, were not fully paid up and for an order that Wragg and Martin should pay the amounts unpaid thereon.

Prior to 1894 Wragg and Martin carried on business as omnibus proprietors in London, owning real property and plant.

In 1894 they determined to convert their business into a limited company. They formed a company to buy the goodwill, stock-in-trade, and property of the business at 46,300 pounds to be paid in cash, debentures and fully paid up shares.

The company was registered January 9th, 1894. Nominal capital 20,000 pounds, divided into 2,000 shares of 10 pounds each. Objects, to acquire the business and property under agreement stated in Article 3 of the articles of association.

Accordingly on January 10th, 1894, an agreement was entered into between Wragg and Martin and the company. 1. The company was to take over the partnership concern and its assets. 2.

Consideration 46,300 pounds, payable 7,000 pounds cash (to be raised from an issue of first secured debentures of 10,000 pounds), 3,000 pounds by the delivery to the vendors of the 3,000 pounds remaining debentures, 6,300 pounds in second mortgage debentures, 10,000 pounds by the company assuming mortgages to that sum, 20,000 pounds by issue of 1,993 fully paid up shares (being 2,000 shares less the seven allotted to the seven signatories of the memorandum of association).

Clause 3 of the agreement accounted for the purchase price thus:

Goodwill and trade marks	6,000 pounds
Freehold	12,000 pounds
Leasehold	500 pounds
Plant	27,000 pounds
Contract rights	250 pounds
Other property	250 pounds
	46,300 pounds

Wragg was to be manager of the company for ten years at 400 pounds a year.

Wragg and Martin and one Harrison were to be the first directors until the ordinary meeting of the company in 1895.

The agreement was executed by the authority of these directors. It was registered as required by the Companies Act, 1867. A supplementary agreement was executed the same day, whereby the solicitors of the company undertook to raise 7,000 pounds by first debentures. 4,600 pounds was to be paid to Martin, 1,000 pounds to the credit of the company, and Wragg and Martin were to pay the debts of the company out of the residue.

The property was transferred to the company. The company paid over the 7,000 pounds and issued to the vendors the debentures, and allotted the fully paid up shares mentioned in the agreement. The company went into liquidation. At that time Wragg and Martin were registered holders of 941 and 891 fully paid up shares respectively.

The liquidator considered the shares improperly issued as fully paid up, and issued the summons, which was also a misfeasance summons, against the directors.

In support of this summons the liquidator produced a certificate signed by Wragg and Martin as directors of the company, and countersigned by one Browning as secretary, which shewed that

on the stocktaking of January 1st, 1894, there was stock-in-trade of the value of 15,375 pounds, and no more; and the liquidator also put in evidence a book belonging to the company containing entries headed "Purchase of Business" upon the debit side of which was entered "1st January, 1894. To vendors, 36,230 pounds" (reckoning apparently without the 10,000 pounds mortgages) and on the credit side was entered, also reckoning without the mortgages:

"2nd Jan., 1894.	By Stock	15,375	pounds
	Goodwill	6,000	"
	"	500	"
	Premises "Leasehold"	500	"
	Fixtures and Plant	208	"
	Premises "Freehold Account"	2,000	"
	Balance to Goodwill, etc.	11,647	"
		36,230	"

The accountant who made these entries was called, and, upon being asked to explain this last entry, said that he found there was a sum of 11,647 pounds to be accounted for, and so he entered it in this way.

The summons was heard by Vaughan Williams, J., who dismissed it. The liquidator appealed.

IN THE COURT OF APPEAL.

LINDLEY, L.J., after stating the facts of the case, continued:— The liquidator contends that the shares issued to Martin and Wragg were improperly issue as fully paid up, and cannot be properly so treated. No attempt has been made to impeach or set aside the agreement of January 10th, 1894. Nor, having regard to the decision of the House of Lords in *Salomon* v. *Salomon & Co.* (1), is it possible to hold that agreement invalid on the materials before us. The company, although a small one, promoted by the vendors and managed by them, must be treated as competent to buy the property which it was formed to acquire, and to take it at the price named by the vendors. The only question is whether the shares issued as fully paid up in part payment of the price can be treated as fully paid up.

Before examining the law upon this point, I will state the grounds on which the appellant contends that they cannot. It

(1) [1897] A. C. 22.

appears from the books of the company that the stock-in-trade, which, by clause 3 of the agreement, is taken to be worth £27,300, was entered as of the value of £15,375 only, and it is contended that the paid-up shares given to the vendors must be attributed in part at least to this difference of £11,000 odd. In other words, it is contended that the company ought to be treated as having issued shares to the nominal amount of £20,000 (the rest of the £27,300 being cash or debentures) in payment of goods of much less value—namely, of the value of £15,000 odd only—as both vendors and buyers well knew.

I am quite unable to take this view of the contract. I will assume that the stock-in-trade was worth only £15,000—i.e., that it would not have fetched more in the market. There was no agreement to buy the stock-in-trade at that price and to pay for it in shares of a larger nominal amount. The third clause in the agreement was merely inserted for stamp purposes. It was absolutely useless and meaningless for any other purpose. No evidence is required to prove it. No lawyer accustomed to the preparation of deeds can fail to see why it was inserted or its legal effect. Stamp duty had to be paid on so much of the £46,300 as was liable to duty, and duty was payable in respect of so much of this sum as was attributable to the goodwill and of the freeholds and leaseholds, and of nothing else. These were valued at the respective sums mentioned in clause 3; £27,300 remained and the stock-in-trade remained, and the £27,300 was attributed to that. I do not say that this was right; but, whether right or wrong, the third clause does not in any way alter the real agreement between the vendors and the company.

The real agreement was that the vendors should sell and that the company should buy the various properties mentioned in the schedule to the agreement for one sum of £46,300, which apparently was £11,000 more than could have been obtained from any other purchaser. But the parties did not appropriate any part of the purchase-money to any definite part of the property purchased, nor is the Court at liberty to do so. It would be wholly wrong to treat the agreement as one to pay £27,300 for stock-in-trade, valued as between the vendors and the company at £15,375, and to attribute the whole of the share capital to the purchase of that particular item. To do this is to fasten on the parties a contract which they never made and one, moreover, which would entirely defeat their intentions if the appellant is right in his contention.

Such being the true agreement between the parties, I will endeavour to ascertain the law applicable to the case.

In *Leifchild's Case* (2), a limited company bought a patent and paid for it in paid-up shares; the holder was held not to be a contributory. The agreement was not sought to be set aside, and no question as to the actual value of the patent was raised. No one apparently thought that question material. This case was decided in 1865 by Kindersley, V.-C., and is valuable as shewing that as early as that year it was taken for granted that shares in a limited company issued as paid up in consideration of property transferred to the company must be treated as paid up unless the whole transaction was set aside on the ground of fraud.

In 1869, *Drummond's Case* (3) came before Giffard, L.J., sitting as the Court of Appeal, and it was then distinctly decided that even a subscriber of the memorandum of association could satisfy his liability in respect of the shares for which he subscribed by paying for them in money or money's worth, or, as Giffard, L.J., put it, in "meal or in malt." This general proposition has never been doubted; but there was a difficulty in applying it to a subscriber of the memorandum of association. The difficulty was to identify the shares which he was to receive as vendor with those which he had bound himself to take and pay for by subscribing the memorandum of association. This difficulty always arises in similar cases. It has never been doubted, so far as I know, that the obligation of every shareholder in a limited company to pay to the company the nominal amount of his shares could be satisfied by a transaction which amounted to accord and satisfaction or set-off as distinguished from payment in cash. In 1867, the Legislature rendered all such transactions invalid unless they were made pursuant to a duly registered contract; but if there is such a contract, the law is now what it always was.

As regards the value of the property which a company can take from a shareholder in satisfaction of his liability to pay the amount of his shares, there has been some difference of opinion. But it was ultimately decided by the Court of Appeal that, unless the agreement pursuant to which shares were to be paid for in property or services could be impeached for fraud, the value of the property or services could not be inquired into. In other words, the value at which the company is content to accept the property must be treated as its value as between itself and the shareholder whose liability is discharged by its means.

The following are the decisions which established this doctrine. The point was first raised in 1869 in *Pell's Case* (4). Pell had

(2) (1865), L. R. 1 Eq. 231. (3) (1869), L. R. 4 Ch. 772.
(4) L. R. 8 Eq. 222.

agreed to sell his business to a limited company for a certain number of fully paid-up shares which were allotted to him and were registered in his name. On the winding-up of the company, Lord Romilly held him to be a contributory in respect of these shares, but to be entitled to an inquiry as to the value of the property given for them, and to be allowed such value, but no more, towards payment of them. This decision, however, was reversed on appeal by Giffard, L.J. (5), on the ground that the agreement for the sale of the business for paid-up shares not being impeached, the shares ought to be treated as paid for in money's worth.

In *Forbes and Judd's Case* (6), Lord Hatherley clearly intimated his concurrence with the view that, unless the agreement was impeached, the value of the property given for the shares could not be gone into. In *In re Baglan Hall Colliery Co.* (7), Giffard, L.J., again acted on the same principle, and, there being, as he said, "some confusion in the views entertained of cases of this nature," he went fully into the grounds of his decision, referring to the various sections of the Companies Act, 1862, which were material. He fully recognized the obligation of a shareholder to pay for his shares; but he again held that this obligation could be satisfied otherwise than by payment in money. In that case, the company had agreed to buy a colliery and to pay for it in shares, and the handing over of the colliery as the consideration for the shares was held to be payment in full (8). No question was raised as to the value of the colliery. In *Leeke's Case* (9), Stuart, V.-C., criticised *Pell's Case* (4), and evidently disapproved the decision of Giffard, L.J.; but, although *Leeke's Case* (9) was affirmed on appeal, the Vice-Chancellor's strictures on *Pell's Case* (4) were not approved (10).

In *Jones's Case* (11), the Court of Appeal again adhered to the principle laid down in *Pell's Case* (4), *Forbes and Judd's Case* (6), and *In re Baglan Hall Colliery Co.* (7), James, L.J., seems to have had some doubt whether he should have come to the conclusion he did if it had not been for the decisions; but I understand his doubt was as to the identification of the shares subscribed for with those given for the property taken by the company. Mellish, L.J., had no misgivings, and expressly approved the decision of Giffard, L.J., in *Pell's Case* (4).

In *Maynard's Case* (12), fully paid-up shares were allotted to a subscriber of the memorandum of association in payment of pro-

(5) L. R. 5 Ch. 11.
(6) L. R. 5 Ch. 270.
(7) Ibid. 346.
(8) L. R. 5 Ch. 357.
(9) L. R. 11 Eq. 100.
(10) (1871), L. R. 6 Ch. 469.
(11) 1870), L. R. 6 Ch. 48.
(12) (1873) L. R. 9 Ch. 60.

perty sold by him to the company. He was held to have satisfied his liability, the company "being free to accept payment in any honest way" (13). It was proved, to the satisfaction of the Court, that the shares for which he subscribed were to be paid for in property to be bought by the company at a sum equal to the amount of the shares subscribed for. It was not suggested that the agreement was *ultra vires* or depended for its validity on the value of the property.

All these cases arose before the Companies Act, 1867, came into operation, although some of them were decided at a later date. In *Fothergill's Case* (14), which arose after that Act was in force, the above decisions were again considered, and were held inapplicable to cases to which that Act applied unless a proper agreement were duly registered. In *Fothergill's Case* (14), there was a registered agreement, but it was held not to apply to the shares for which he had subscribed the memorandum of association, and he was held to be a contributory in respect of them. But I can find nothing to throw doubt on the application of the law, as settled in *Pell's Case* (4), and the others referred to above, to similar cases arising since 1867, and in which the shares in question have been issued pursuant to a duly registered agreement as required by the Act.

In *Anderson's Case* (15), a colliery was sold to a limited company for paid-up shares. A proper agreement was registered. The price of the colliery to the company was £150,000, to be paid in shares. The vendors had shortly before agreed to buy it for £66,000 and to pay £42,000 in shares. They, therefore, made a huge profit. It was, nevertheless, held by the Court of Appeal that so long as the agreement for sale to the company was unimpeached, all the £150,000 shares must be treated as fully paid up. This case is the last to which it is necessary to refer bearing directly on the question I am examining.

I understand the law to be as follows: The liability of a shareholder to pay the company the amount of his shares is a statutory liability, and is declared to be a specialty debt (Companies Act, 1862, sec. 16), and a short form of action is given for its recovery (sec. 70). But specialty debts, like other debts, can be discharged in more ways than one—e.g., by payment, by set-off, accord and satisfaction, and release—and, subject to the qualifications introduced by the doctrine of *ultra vires*, or, in other words, the limited capacity of statutory corporations, any mode of discharging a

(13) L. R. 9 Ch. 65. (14) (1873), L. R. 8 Ch. 270.
(15) (1877), 7 Ch. D. 75.

specialty debt is as available to a shareholder as to any other specialty debtor. It is, however, obviously beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid-up shares for nothing and preclude itself from requiring payment of them in money or money's worth: *In re Eddystone Marine Insurance Co.* (16), nor can a company deprive itself of its right to future payment in cash by agreeing to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement for a statutory action for non-payment of calls: see *Pellatt's Case* (17).

From this, it follows that shares in limited companies cannot be issued at a discount. By our law, the payment by a debtor to his creditor of a less sum than is due does not discharge the debt: and this technical doctrine has also been invoked in aid of the law which prevents the shares of a limited company from being issued at a discount. But this technical doctrine, though often sufficient to decide a particular case, will not suffice as a basis for the wider rule or principle that a company cannot effectually release a shareholder from his statutory obligation to pay in money or money's worth the amount of his shares. That shares cannot be issued at a discount was finally settled in the case of the *Ooregum Gold Mining Co. of India* v. *Roper* (18), the judgments in which are strongly relied upon by the appellant in this case. It has, however, never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper, and pay for them in fully paid-up shares. Provided a limited company does so honestly and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, it appears to be settled by *Pell's Case* (4) and the others to which I have referred, of which *Anderson's Case* (15) is the most striking, that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the companies and their creditors. The Legislature in 1867 appears to me to have distinctly recognised such to be the law, but to have required, in order to make such agreements binding, that they shall be registered before the shares are issued.

There is certainly no decision yet which is opposed to the above statement of the law. The observations in *In re Addlestone Linoleum Co.* (19), *In re Almada and Tirito Co.* (20), *Lee* v. *Neuchatel*

(16) [1893] 3 Ch. 9.
(17) (1867), L. R. 2 Ch. 527.
(18) [1892] A. C. 125.
(19) 37 Ch. D. 191.
(20) 38 Ch. D. 415.

Asphalte Co. (21), and *Ooregum Gold Mining Co. of India* v. *Roper* (18), relied upon by the appellant in this case, fall far short of deciding that the value of the property or services paid for in shares can be inquired into or is material in any case in which the sale is not impeached. These and other cases decided upon the Act of 1867 shew (1) that since that Act, as before, shares must be paid for in money or money's worth; (2) that since that Act, as before, they may be paid for in money's worth; (3) that since the Act, payment in money's worth can only be effectually made pursuant to a properly registered contract; (4) that, even if there is such a contract, shares cannot be issued at a discount; (5) that if a company owes a person £100, the company cannot by paying him £200 in shares of that nominal amount discharge him, even by a registered contract, from his obligation as a shareholder to pay up the other £100 in respect of those shares. That would be issuing shares at a discount. The difference between such a transaction and paying for property or services in shares at a price put upon them by a vendor and agreed to by the company may not always be very apparent in practice. But the two transactions are essentially different, and whilst the one is *ultra vires,* the other is *intra vires.* It is not law that persons cannot sell property to a limited company for fully paid-up shares and make a profit by the transaction. We must not allow ourselves to be misled by talking of value. The value paid to the company is measured by the price at which the company agrees to buy what it thinks it worth its while to acquire. Whilst the transaction is unimpeached, this is the only value to be considered.

This appears to me to be in complete accordance with the passages quoted from the judgments of Cotton, L.J., in *In re Almada and Tirito Co.* (20), and Lords Watson and Macnaghten, in *Ooregum Gold Mining Co. of India* v. *Roper* (18). Lord Herschell's judgment, as I understand it, is distinctly favourable to the respondents. In my judgment, the law is settled, and cannot be declared wrongly settled by this Court, at any rate. If it is to be altered, the decisions which have settled it must be declared wrong by the House of Lords, or the law must be altered by Act of Parliament. Vaughan Williams, J., has had to consider this matter on more than one occasion—namely, in *Chapman's Case* (22), and again in the present case—and on both occasions, the principle on which he based his decision is, in my judgment, correct. The summons which has raised the question of Martin and Wragg's liability is of an unusual kind, being a misfeasance sum-

(21) 41 Ch. D. 1. (22) [1893] 1 Ch. 771.

mons and an alternative application to enforce payment up of the shares. It was dismissed with costs, and no question was raised on appeal, except the important question of principle which I have considered. The appeal must be dismissed with costs.

A. L. SMITH, L.J., and RIGBY, L.J., reached the same conclusion.

Directions or Conditions in Act or Charter of Incorporation to be Observed Prior to Commencement of Business.

EASTERN ARCHIPELAGO COMPANY v. THE QUEEN.

1854, 2 E. & B. 856.

On the above subject, it was said in above case by

CRESWELL, J.:—"Of these directions (which in this charter must be treated as conditions), some appear to have been framed with the object of protecting the shareholders, others for the protection of the public. The clause prohibiting the commencement of business until capital to a certain amount had been paid up is of the latter description, and extremely necessary for that purpose, inasmuch as the creditors of this incorporated partnership would have no remedy against the members, but against the corporate property only. If, then, the corporation, under colour of their charter, began to trade before they were authorized so to do, it was an abuse of their charter which worked a forfeiture, and rendered them liable to have it cancelled by means of a *scire facias*. And this is a matter in which the subject is interested; the abuse of the franchise is to his prejudice; and he, *ex debito justitiæ*, is entitled to a *scire facias* to procure the cancellation of it. Every franchise granted by the Crown is subject to the implied condition, that it shall be used according to the grant; and if it be used otherwise, the franchise is forfeited. Here, the franchise of being a corporation and trading as a corporation was to be exercised when a capital of £50,000 had been paid up; without any express condition, this would have been subject to an implied condition that they should not trade otherwise; and their trading as a corporation, when not authorized to do so, would be an abuse of their charter."

NOTE.—*See the case of Dominion Salvage and Wrecking Company* v. *The Attorney-General of Canada, 21 S. C. R. 72, in which the above case is cited and followed.*

Directors' Relation to Company. Nature of Obligation.

IN RE FOREST OF DEAN MINING COMPANY.

1878, L. R. 10 Ch. D. 450.

JESSEL, M.R.

The Forest of Dean Coal Mining Company was formed in 1873 for the purchase of certain collieries of which J. F. Corbett was the owner.

In the negotiations for the purchase, in 1872, it was agreed that the purchase-money for the collieries should be £35,000, to be paid by the company partly in money and partly in shares; and it was agreed between Corbett and J. F. Johnson, the promoter of the company, that Johnson and his nominees should receive out of the purchase-money £10,000 for its promotion, which sum was subsequently paid to them. At that time, Osman Barrett had a mortgage on the collieries for £7,000, and it was agreed that he should join in the conveyance, and take a fresh mortgage for the same amount. The property was accordingly conveyed to the trustees of the company, and a fresh mortgage executed.

Barrett was informed by Corbett at the time of these transactions of the payment of the said sum of £10,000, but he was not then a shareholder in the company, nor one of the proposed directors. He afterwards qualified, and, in December, 1875, he became a director, but he did not take any steps towards recovering for the company the said sum of £10,000.

In 1877, an order was made for winding up the company, and the liquidator now applied, by way of adjourned summons, to make Johnson and his nominees liable to repay to the company the said sum, and also to make Barrett liable for his alleged misfeasance in not taking steps to recover the money of the payment of which he was cognizant.

The main question was whether, under the above circumstances, Barrett was to be made liable.

JESSEL, M.R.:—I am quite clear about this case. One must be very careful in administering the law of joint stock companies not to press so hardly on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any

character to lose, from becoming directors of companies at all. On the one hand, I think the Court should do its utmost to bring fraudulent directors to account, and, on the other hand, should also do its best to allow honest men to act reasonably as directors.

Wilful default, no doubt, includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund—in that case, he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle. Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners; it does not much matter what you call them, so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it. They are bound, no doubt, to use reasonable diligence, having regard to their positions, though probably an ordinary director, who only attends at the board occasionally, cannot be expected to devote as much time and attention to the business as the sole managing partner of an ordinary partnership, but they are bound to use fair and reasonable diligence in the management of their company's affairs, and to act honestly.

But where, without fraud and without dishonesty, they have omitted to get in a debt due to the company by not suing within time, or because the man was solvent at one moment and became insolvent at another, I am of opinion that it by no means follows as a matter of course, as it might in the case of ordinary trustees of trust funds or of a trust debt, that they are to be made liable. Traders have a discretion as to whether they shall sue their customers, a discretion which is not vested in the trustees of a debt under a settlement. In fact, the customers of a trading partnership are very often allowed time, because the partners may think that, if they do not allow them time, they will drive the customers into bankruptcy and so suffer a greater loss than by giving them time; indeed, they not only very often give them time, but they lend them money or sell them goods in the hope that better times may come and enable them to pay their debts.

Again, it may very often be most injurious to the trading concern to sue some of their debtors after the first few losses, because driving some of their debtors into bankruptcy might be very injurious to the trade, more so, in fact, than the chance of suffering a loss by letting them go on without taking action against them. Such a case as this has, in my opinion, no direct relation to the rule which makes it incumbent on a trustee to sue a debtor at once

under pain of having the liability for the debt afterwards thrown upon him, on the ground that if he had sued, he could have got the money. On the other hand, as we know, a debtor must be presumed to be solvent, unless the trustee can shew he was insolvent.

But, in my opinion, no such liability attaches to directors of joint stock companies. They must, as ordinary managing partners of a trading concern, be allowed a discretion, and not be too much interfered with by the Court, or have inquiries made by the Court as to whether the debtor could have paid at a particular moment a larger or a smaller amount if he had been sued. So much with regard to ordinary debts.

Again, directors are called trustees. They are, no doubt, trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company. The company is the creditor, and, as I said before, they are only the managing partners. In my opinion, it is extravagant to call them trustees of a debt when it has not been received. You may, of course, have an actual trust of a debt, as in the case I put before, where trustees have assigned to them a debt to get in, but that is not the case with directors of a company. A director is the managing partner of the concern, and, although a debt is due to the concern, I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee. So much for the question of unpaid debts.

The next point is this: does that reasoning which applies to a debt apply to a demand of this kind, which is a liability, though not strictly a debt? I do not think it does. There are totally different considerations applicable to this kind of demand or liability from those applicable to an uncontested debt.

Analogy or illustration is sometimes useful. In the case of trustees newly appointed, their liability extends to seeing that they get the trust funds into their hands; but did anybody ever imagine that their liability extended beyond that, or that they are bound to inquire into all the dealings with the trust fund from the origin of the trust, and to pursue every past trustee who might by any means whatever have become liable to pay more than the actual trust funds? The case I would put in illustration is this: suppose a trust of £10,000 consols, and one of the trustees with the connivance of the other sells out the stock and engages with it in trade; ten years afterwards, he replaces it; five years after that, the trustees retire, and new trustees are appointed in their place, who find the fund intact. One of the trustees is then told, "It is all

right now, but the money has only been paid in five years before," and is told that one of the former trustees had used it in his trade. It is intolerable to suppose that the new trustee should be made liable for not filing a bill, as it was formerly under the old procedure, of bringing an action, as it is now, against the former trustee, or his representative, supposing he is dead, with a view of getting from him either the extra interest over and above the interest of the consols, or the profits he might have made from the use of the money in his business. Is that sort of liability on the part of a former trustee one which the new trustee is bound to enforce, though, no doubt, it would be one which the *cestui que trust* has power to enforce? In my opinion, it would be extending the liability of trustees, which, in my judgment, is quite heavy enough as the law stands, to a point to which it has never been stretched before; and, as I have said before, I think if there has been any error at all in the course taken by the Courts of Equity against trustees, it has been in pressing honest trustees too far, one result of which has been that it is now very difficult to get people to accept offices of trust for which they receive no remuneration, and in respect of which they may be placed under great liabilities. I am always ready to make, and have always been desirous of making, a dishonest man liable for every farthing of which he has defrauded a trust, and of making him liable also to pay exemplary damages or interest in every case in which the law will allow it; but at the same time, I have always thought it would have been much more wise in Courts of Equity had they been less strict as regards mere omissions, or even what they have chosen to call neglect, on the part of persons who endeavour honestly and faithfully to perform their trust, but who, notwithstanding, either from some mere mistake, or some error in law or of judgment on the part of themselves or their legal advisers, or of some defalcation on the part of their agents, have been made liable sometimes for vast sums of money, although they had taken every possible pains to appoint proper solicitors and counsel, and to engage proper agents to advise them, and to manage the estates, and to receive the rents and profits of them. Therefore, I think it is not the duty of a Judge to strain or stretch the law, so as to make it apply to new liabilities, and if such a case as I have mentioned came before me, I certainly should not hold the new trustee liable.

Here follows a discussion of the facts in the light of these principles, in the course of which the Master of the Rolls said:

"In the first place, I have never heard that it has been held to be the duty of a director to communicate to his shareholders knowledge acquired by him years before, as to misconduct with reference

to the affairs of the company on the part of other persons for which they may be still liable. I know of no reason whatever why he should do so, or of anything which compels a director to disclose to his shareholders his antecedent knowledge, even of frauds committed on the company."

And the summons was dismissed.

In the case of *In re Lands Allotment Company*, 1894, L. R. 1 Ch. 616, at 638, Kay, L. J., says:—

"I do not believe that there has ever been any deviation from the language of the late Sir George Jessel in the case of *In re Forest of Dean Coal Mining Company*. Sir George Jessel said this: 'Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company.' So that when they get assets of the company under their control or into their hands and deal with them in a way which is beyond the powers of the company, they are liable as for a breach of trust."

Promoters. Fiduciary Relation. Duty of Disclosure.

ERLANGER v. THE NEW SOMBRERO PHOSPHATE CO.

1878, L. R. 3 A. C. 1218.

HOUSE OF LORDS.

A "syndicate" (or partnership) of persons, of which one *E.* was at the head, purchased from the official liquidator of an insolvent company an island said to contain valuable mines of phosphates. *E.*, who managed the business of this purchase, prepared to get up a company to take over the island and to work the mines. He named five persons as directors. Two were abroad. Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appeared to have acted as a business agent for *E.;* the other was a private friend of *E.* The sale of the island was made, nominally, by a person who had really no interest in the island, and was made to the director who was the business agent of *E.*, and who appeared as the purchaser for the company. The two directors, with whom, through *E.'s* arrangement, a third person, *D.* (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted, on its behalf, the purchase. A prospectus was issued, giving a very favourable account of the scheme. Many persons took shares. At the first meeting of shareholders, *D.* took the chair as a director. Being questioned by a shareholder as to certain rumours relating to the purchase of the island and its price, on the first sale, and then on its resale to the company, *D.* avowed his want of knowledge, but declared his belief in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February, 1872. In June, 1872, there was a general meeting of the shareholders. The rumours before referred to had become stronger, and a committee of investigation was appointed; on the

receipt of whose report in August, 1872, the original directors were, at a public meeting, removed, and a new set of directors appointed, with power to take measures, etc., for the benefit of the company. The new directors entered into a correspondence with the vendors of the island, which terminated in nothing, and a bill was, in December, 1872, filed to rescind the contract.

Vice-Chancellor Malins had held that the transaction could not be set aside. The Court of Appeal reversed that decision. On appeal to the House of Lords it was said by

Lord Penzance (after reciting the facts) :—Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was *brought about by the conduct* and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of Equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to shew they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir Thomas Dakin or Admiral Macdonald was aware of the price at which the property had just been brought under the authority of the Court of Chancery, nor, indeed, that they even knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to

that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust,* parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.

I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the Lord Chancellor, that if, within a proper time after the completion of this purchase, a bill had been filed by the company, the purchase must have been set aside. The question remains whether the present bill has been filed with sufficient promptitude for that purpose.

The learned Lord then discussed the question of delay, holding that there had been no delay in impeaching the transaction such as to deprive the company of the right to rescind.

Lord Cairns, L.C.:— * * * In the whole of this proceeding up to this time the syndicate, or the house of *Erlanger* as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that, in forming the company, they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells

it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.

Lord Cairns thought there had been delay which deprived the company of the right to relief.

The other learned Lords delivered judgments to the like effect as that of Lord Penzance.

Transactions Between Company and Shareholders. Sale by Director to Company. Right of Majority Shareholder to Vote Though Personally Interested.

NORTH-WEST TRANSPORTATION COMPANY, LIMITED, AND JAMES HUGHES BEATTY, ET AL. (DEFENDANTS, APPELLANTS) v. HENRY BEATTY (PLAINTIFF, RESPONDENT).

L. R. 12 A. C. 589.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The plaintiff, Henry Beatty, was a shareholder in the defendant company, and sued on behalf of himself and all other shareholders in the company, except the defendant shareholders. The defendants are the company and five shareholders, who at the commencement of the action were the directors of the company. The claim was to set aside a sale made to the company on February 10th, 1883, by James Hughes Beatty, one of the directors of a steamer called the United Empire, of which, previously to such sale, he was sole owner. The by-law of the shareholders ratifying the purchase was carried on February 16th, 1883, by means of votes of the defendant, James Hughes Beatty. The meeting of February 16th was called pursuant to a resolution passed at the annual meeting held on February 7th. The case originated in the Ontario Courts, and went from there to the Supreme Court of Canada, and thence to the Privy Council. The Supreme Court of Canada had decided against the transaction because of the defendant James Hughes Beatty's acting in double and conflicting characters.

The advice of the Board to Her Majesty was expressed, in part, as follows by

Sir Richard Baggallay:— * * * The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.

(*The facts were here set forth at length and the decisions of the lower Courts recited.*)

From this decision of the Supreme Court of Canada the appeal has been brought with which their Lordships have now to deal. The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant J. H. Beatty, but it is equally clear that it was within the competency of

the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant J. H. Beatty possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the by-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and his co-directors had entered, or to make a similar contract, which latter seems to have been what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to shew that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognised the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the United Empire was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail: to reject the votes of the defendant upon the question of the adoption of the by-law would be to give effect to the views of the minority, and to disregard those of the majority.

The Judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the by-law; their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships will humbly advise Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that Court with costs; the respondent must bear the costs of the present appeal.

See also *Burland* v. *Earle*. (1)

Identity of Company as Distinct from Persons Holding its Shares. "One-man Company."

SALOMON v. SALOMON AND COMPANY, LIMITED.

1897, A. C. 22.

THE HOUSE OF LORDS.

A trader sold a solvent business to a limited company with a nominal capital of 40,000 shares of £1 each, the company consisting only of the vendor, his wife, a daughter and four sons, who subscribed for one share each, all the terms of sale being known to and approved by the shareholders. In part payment of the purchase-money debentures forming a floating security were issued to the vendor. Twenty thousand shares were also issued to him and were paid for out of the purchase-money. These shares gave the vendor the power of outvoting the six other shareholders. No shares other than these 20,007 were ever issued. All the requirements of the Companies Act, 1862, were complied with. The vendor was appointed managing director, bad times came, the company was wound up, and after satisfying the debentures there was not enough to pay the ordinary creditors.

The Courts below had held that the formation of the company and the transactions above mentioned were a scheme to enable the trader (the appellant) to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of the debentures. The judgment in effect was that the company (in liquidation) was to be indemnified by the appellant from the company's unsecured debts, and was to have a lien upon the debentures till the judgment was satisfied, and there were declarations in accordance with the above holdings. There was a cross-appeal by the company for the rescission of the agreement, cancellation of the debentures and repayment of moneys paid to the trader under those transactions.

(1) 1902 A. C. 83.

On appeal to the House of Lords,

Lord Halsbury, L.C.:—My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all—whether in truth that artificial creation of the Legislature had been validly constituted in this instance; and in order to determine that question it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to any one—and certainly not to these persons themselves — to deny that they were shareholders.

I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders or of making them shareholders is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders, they are shareholders for all purposes; and even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the *cestuis que trust* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities, and, dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body.

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with; you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some

proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motive of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will for the sake of argument assume the proposition that the Court of Appeal lays down—that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

I observe that the learned Judge (Vaughan Williams, J.), held that the business was Mr. Salomon's business, and no one else's, and that he chose to employ as agent a limited company; and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent (the company). I confess it seems to me that that very learned Judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.

Lindley, L.J., on the other hand, affirms that there were seven members of the company; but he says it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done.

It is obvious to inquire where is that intention of the Legislature manifested in the statute. Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is, or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention

is not limited to so narrow a proposition as this, that the seven shareholders must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course easy to say that it was contrary to the intention of the Legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition, it would be pertinent to ask whether two or three, or indeed all seven, may constitute the whole of the shareholders? Whether they must be all independent of each other in the sense of each having an independent beneficial interest? And this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person?

My Lords, I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. Lopes, L.J., says: "The Act contemplated the incorporation of seven independent *bonâ fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent *bonâ fide* members with a mind and will of their own, and not the puppets of an individual." are by construction to be read into the Act. Lopes, L.J., also said that the company was a mere *nominis umbra*. Kay, L.J., says: "The statutes were intended to allow seven or more persons, *bonâ fide* associated for the purpose of trade, to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company."

My Lords, the learned Judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing; if it had a legal existence, and if consequently the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered.

Vaughan Williams, J., appears to me to have disposed of the argument that the company (which for this purpose he assumed to be a legal entity) was defrauded into the purchase of Aron Salomon's business because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but assuming that it was, the learned Judge most cogently observes that when all the shareholders are perfectly cognisant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger* v. *New Sombrero Phosphate Co.* (1), (I quote the head-note), is that "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company—every shareholder—knows exactly what is the true state of the facts (which for this purpose must be assumed to be the case here), Vaughan Williams, J.'s, conclusion seems to me to be inevitable that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

My Lords, the truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to

(1) 3 App. Cas. 1218.

the learned Judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned Judges below; but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned Judges. The appellant, in my opinion, is not shewn to have done or to have intended to do anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own.

The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case, I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that the cross-appeal be dismissed with costs to the same extent.

The other learned Lords agreed in allowing the appeal and dismissing the cross-appeal.

ATTORNEY-GENERAL (CANADA) v. STANDARD TRUSTS COMPANY OF NEW YORK.

1911, A. C. 498.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

In this case Viscount Haldane in delivering the judgment of the Judicial Committee of the Privy Council points the distinction between the two last cases, as follows:

In the course of the argument for the appellant the well-known case of *Erlanger* v. *New Sombrero Phosphate Company* was much relied on as shewing that the action of the directors could not stand. It is sufficient to observe that for the reasons given in the House of Lords in *Salomon* v. *Salomon* the doctrine of the former case has no application to circumstances such as those of the present case, where every one interested in the capital of the company has, with full knowledge, concurred in the act impeached.

Directors' Duty to Shareholders.

ALEXANDER v. AUTOMATIC TELEPHONE COMPANY.

69 L. J. Ch. 428; L. R. 1900, 2 Ch. 56.

THE COURT OF APPEAL.

This action was brought by Messrs. Alexander and Gibbs, "suing on behalf of themselves and all other shareholders" in the defendant company, against the company and three of its directors, Margowski, Cohen, and Sworn. The plaintiffs were the two other members of the board.

The company was incorporated on July 1, 1897, with a capital of £100,000 in shares of 5s. each.

The signatories to the memorandum were Margowski for 19,400 shares, the same (as managing director of the Honduras Government Banking and Trading Co.) for 6,000 shares, the plaintiffs Alexander and Gibbs for 10 shares each, Cohen for 200 shares, and Sworn for 800 shares. Two other signatories signed for 10 shares each.

Article 5 of the articles of association provided that the shares of the company should be "under the control of the directors, who may, subject to the terms of the company's memorandum of association, issue, allot, or otherwise dispose of the same to such persons, for such consideration, and upon such terms and conditions as the board may determine * * * and may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls."

By article 13 it was provided that the directors might, "subject to any special terms made on allotment, * * * from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that one month's notice at least is given of the time and place for payment, and that no one call shall exceed 20 per cent. of the nominal amount of the shares, and that such calls shall be made at intervals of not less than one month.

By article 121 dividends were payable in proportion to the amount paid up on the shares.

The memorandum shares and a number of other shares were allotted, and on all of them, except those held by Margowski, Cohen, Sworn, and the Honduras Co., the sum of 3s.—that is, 6d. on application and 2s. 6d. on allotment—had been paid. In respect of the excepted shares the plaintiffs alleged that only £784 in all had been paid, and that on these shares there was still due and payable the sum of £3,176, and the plaintiffs complained that the three defendant directors, being a majority of the board, were able to, and did, control its action by their votes, and in breach of their duty as directors, and against the interests of the defendant company, prevented the passing of resolutions or taking steps to enforce payment by such defendants or the Honduras Co. (in which they were said to be interested), of the amounts due on their shares and the shares held by the Honduras Co.; that the defendant directors, by means of their voting power, had made a further call of 1s. per share; that they were acting in furtherance of their own interests and in fraud of the rights of the other shareholders, and were using the powers entrusted to them as directors for their own ends, and not for the benefit of the company. It was also alleged that the defendant directors had control of the majority of the votes of the shareholders of the defendant company.

The plaintiffs asked for a declaration that the holders of the memorandum shares were bound to pay up 3s. per share—namely, 6d. on application and 2s. 6d. on allotment—like the holders of other shares.

For the defence it was pleaded that on June 30th, 1897, before the company was incorporated, it was agreed at a meeting of the signatories that nothing should be payable by any of the defendant directors or the Honduras Co. on application or allotment in respect of their memorandum shares, and that the memorandum was signed on this condition; that at a board meeting, after incorporation — namely, on July 5th, 1897 — two resolutions were passed (both plaintiffs being present and voting in their favour), for the allotment of shares; that by the first resolution the memorandum shares were allotted without requiring payment on allotment, and that by the second resolution a payment of 2s. 6d. per share in respect of other shares was required on allotment. The defendant directors also said that they were acting under the articles and in the interests of the company and had committed no breach of duty. It was also pleaded

in the defence that this was an attempt to interfere with the internal management of the company, and that the action was not maintainable in this form.

Since the issue of the writ the defendant Cohen had retired from the board of directors.

On the action coming for trial, both the plaintiffs admitted being present at the meeting of the signatories on June 30th, and at the first meeting of the directors on July 5th, 1897, but denied that any such agreement as alleged was come to on June 30th, and said that the resolutions passed on July 5th were not properly explained to the meeting. The view taken of the evidence on this point in the Court of Appeal is stated in the judgments.

It was admitted that, when the writ was issued, the defendant directors held a majority of the shares of the company.

Cozens-Hardy, J., dismissed the action.

The plaintiffs appealed.

Lindley, M.R., read the following judgment: Subscribers to a memorandum of association of a company limited by shares are liable, and only liable, by virtue of their subscription, to pay up the amount of their shares as and when called up. The times when payments are to be made and the amounts to be paid are not prescribed by statute, except by section 38 of the Companies Act, 1862, which only comes into operation when the company is being wound up. But until the commencement of the winding up of the company the times and amounts of payment depend, apart from express agreement between the company and the signatories, on the company's articles of association. In the absence of other articles, Table A will be applicable. That this is the true position of those who sign the memorandum of association is perfectly plain from the Companies Act, 1862, sections 8, 11, 14, 15, 23, and 38, and Table A, articles 4-7. A subscriber of a memorandum becomes by section 23 a member in respect of the number of shares subscribed for by him, without any further application by him or allotment of shares to him. But as by section 22 all shares have to be numbered, and the numbers must be entered in the register (see section 25), there must be an appropriation to each subscriber of the proper number of shares properly numbered, not to constitute him a member, but to enable a proper register to be kept and proper certificates to be given and transfers made—see sections 22, 25, and 31, and Table A, articles 2, 3,

and 8-16. It follows from this that, in the absence of any special agreement or article requiring a subscriber of a memorandum of association to make some payment on subscription or allotment, nothing is payable by him as a subscriber in respect of his shares until calls are made upon them. This is the strength of the defendants' case. Further, if more shares than those taken by the subscribers of the memorandum are issued by the directors, there is nothing to prevent them from offering those shares on such terms as regards payment to the company on application and allotment as the directors may think expedient. Payments so required to be made are not calls, because the payments are to be made by persons who are not yet members; but, when made, those payments must be treated, unless otherwise agreed, as payments on account of the nominal capital of the company, and as reducing *pro tanto* the liability of those who pay. Such persons have nothing to complain of if they pay according to their bargain, and the subscribers of the memorandum pay according to theirs. This is the weakness of the plaintiffs' case. From this point of view the plaintiffs have no ground of complaint, and the decision appealed from is unimpeachable.

But there is another point of view from which the case must be regarded. There are other elements in the case which have to be taken into consideration, and on which the plaintiffs strongly rely. The directors, who had subscribed the memorandum for an unusually large number of shares, issued shares to other persons on the terms that 6d. per share should be paid on application and 2s. 6d. per share on allotment—that is, 3s. per share had to be paid by the allottees, whilst the directors themselves paid nothing in respect of their own shares. The directors in fact so managed matters as to place themselves in a better position as regards payment than the other shareholders, and they did so without informing the other shareholders of the fact. This, the plaintiffs contend, was a breach of duty on the part of the directors to those who applied for and took shares upon the faith that the directors were not obtaining advantages at their expense. It is no answer to the plaintiffs' case so put to appeal to the contracts alone, for the charge is that the directors were guilty of a breach of duty in procuring those contracts and in taking advantage of them so as to benefit themselves at the expense of the other shareholders. In the statement of claim and in the Court below the defendants were charged with deliberate fraud; but this charge was ultimately abandoned in the Court below, and, having been abandoned, it cannot be brought forward again, or be listened to on appeal.

But, apart from all fraud, and although the directors acted in the belief that they were doing nothing wrong, there may, nevertheless, have been a breach of duty such as is relied upon, and it is necessary to consider whether there was or was not.

The company was registered on July 1st, 1897. On June 30th the memorandum of association was signed, and the subscribers had a meeting at which, it is said, they agreed that the defendants should pay nothing in respect of their shares on allotment. Such an agreement, if come to, could not, of course, bind the company, which was not then formed. But the defendants say that the plaintiffs Alexander and Gibbs were then told that the defendants were not to pay up anything on their shares on allotment, and that the plaintiffs assented to this arrangement. The plaintiffs emphatically deny that they knew of or assented to any such arrangement. On July 5th, the first meeting of the directors was held, and on that day two resolutions were passed. One was that the shares subscribed for by those who signed the memorandum of association should be allotted to them. The resolution treats them as applying for 26,440 shares of 5s. each, and of having those shares allotted to them in the quantities applied for by each, "as per applications and allotment sheet marked A, now signed by the chairman." This shewed that three of those subscribers of ten shares each—namely Alexander, Gibbs, and Baron Cohen—had paid up or were to pay 3s. per share in respect of their 5s. shares. There was nothing to shew that the other subscribers had paid or were to pay anything on their shares. There was a conflict of evidence at trial as to whether the defendants did or did not explain to their co-directors that they did not intend to pay up 3s. on their shares. The plaintiffs Alexander and Gibbs distinctly deny that they were told anything of the sort. They deny that they saw the sheet A. The defendant Cohen and the secretary say that it was explained that the others did not intend to pay, and that the sheet A was produced. The learned Judge finds that Alexander and Gibbs knew of the resolution and concurred in it, but he does not say that these gentlemen are not to be believed when they deny that they were informed that the other directors were not going to pay.

So far as it is necessary for the defendants to rely on any agreement exempting them from liability to pay 3s. like other shareholders, I am of opinion that they fail in proving such an agreement. The resolution of July 5th, to which I am referring, did not by itself, and apart from the conduct of the defendants as directors, either increase or diminish the defendants' liability as

subscribers of the memorandum of association. It simply carried out what their subscription involved. The other resolution passed at the same meeting was to allot 9,560 shares to persons who had applied for them on payment of 2s. 6d. per share. This was in addition to 6d. per share already paid on application. Other shares have been issued on similar terms. Both the plaintiffs Alexander and Gibbs are holders of shares besides those for which they subscribed the memorandum of association; and they paid up 3s. per share for all of them on allotment. So far, therefore, they are in the same position as all the other shareholders except the defendants. The fact, however, that three subscribers of the memorandum paid 3s. on their shares, whilst the defendants did not, is difficult to reconcile with the existence of any understanding that all the subscribers should stand on their strict legal rights. The defendants rely on article 5 as entitling the directors to issue shares on any terms they think expedient, and to make differences between some shareholders and others. But this, I am satisfied, is an afterthought. The defendants were not in fact acting on this article at all. But, even if they did, this article would not, in my opinion, justify them in making a difference in their own favour without disclosing the fact to the shareholders and obtaining their consent to the arrangement.

The Court of Chancery has always exacted from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim *caveat emptor* has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them. *Gilbert's Case* (1), is only one of many instances illustrating this principle. In this case there is no question that, by obtaining 3s. a share from the other shareholders and paying nothing themselves, the defendants threw upon the other shareholders a burden which they did not share themselves. It is true that by article 121 dividends were only payable in proportion to the amounts paid up on the shares; and as regards dividends, had there been any, the defendants would have been at a disadvantage. But the advantage they obtained at the expense of the other shareholders was the advantage of deferring their own contributions to the funds of the company at the expense of the other shareholders. This, in

(1) 39 L. J. Ch. 837; L. R. 5 Ch. 559.

my opinion, was a clear breach of duty, unless the other shareholders knew of it and sanctioned it.

The defendants say that the memorandum and articles, which named the first directors, gave notice to all the shareholders that nothing was payable by the defendants except when calls were made on their shares. The defendants further say that, at all events, the plaintiffs Alexander and Gibbs knew and assented to what was done, and that this action, therefore, cannot be sustained by them. As regards the notice given by the memorandum and the articles to the shareholders generally, I am clearly of opinion that they give no notice of anything except what they expressly state; they give no notice at all that the directors would so exercise their powers, and so act towards their shareholders as to benefit themselves at their expense. It is impossible to come to the conclusion that the applicants for shares knew of or sanctioned the conduct of which they now complain.

The next question is, whether the plaintiffs Alexander and Gibbs knew of and assented to any arrangement to the effect that the defendants should be in a better position than themselves and other shareholders as regards payment on allotment. As already stated, the plaintiffs emphatically deny that they knew anything of the sort, and they say that they first discovered in July or August, 1898, that the defendants had not paid up 3s. on allotment like other shareholders. They say that they were unable to see the books and ascertain the facts before that time. [His Lordship reviewed the evidence, and continued:] In this state of the evidence, the only conclusion I can come to is that there was some understanding between some of the persons who signed the memorandum of association that Margowski and one or two of his friends should be treated differently from other shareholders as regards payment on allotment, but that neither the plaintiffs nor any of the other shareholders, except Margowski and his friends, ever knew of or assented to the use they made of their powers to secure for themselves advantages as to the payment at the expense of their co-adventurers. Having carefully read the shorthand notes of the proceedings in the Court below, I cannot help thinking that Mr. Justice Cozens-Hardy placed too much stress on the resolutions, and treated them as conveying more information than they really were calculated to convey or did convey to the plaintiffs. If the learned Judge had said that he did not believe the plaintiffs, and believed Cohen and Mendelsohn rather than the plaintiffs, I should feel more difficulty than I do. But the learned Judge has not said that he disbelieved the plaintiffs, and I certainly see no reason

for doing so. Upon the merits of the case I come to the conclusion that a breach of duty by the directors to the company and the other shareholders in it has been established.

It is necessary, however, to consider the form of the action, and the relief which can be given. The breach of duty to the company consists in depriving the company of the use of the money which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management, which, according to *Foss* v. *Harbottle* (2), and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. Under these circumstances an action by some shareholders on behalf of themselves and others against the defendants is in accordance with the authorities, and is unobjectionable in form—see *Menier* v. *Hooper's Telegraph Co.* (3). An action in this form is far preferable to an action in the name of the company and then a fight as to the right to use the name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present.

Apart, however, from the form of the action, the defendants contended that, having regard to the pleadings, and to the calls made and paid since the action was brought, and to what took place at the trial, no relief could now be given to the plaintiffs. [His Lordship examined this part of the case, and considered that the defendants could not successfully maintain that they had to meet on appeal a really different case from that which was made in the Court below.] The plaintiffs' case was obscured by charges of fraud, and by being based in their pleadings, and to some extent in argument, on legal rather than on equitable grounds. But the facts which constitute the plaintiffs' case are set out in the pleadings, and were fully investigated in the Court below; and counsel in the Court below more than once put the plaintiffs' case on its true basis. The plaintiffs' statement of claim is full of charges of fraud. These have been abandoned, and the plaintiffs must pay all the costs occasioned by them. But it does not follow that their action ought to be wholly dismissed—see *Hilliard* v. *Eiffe* (4).

(2) [1843] 2 Hare, 461.
(3) [1874] 43 L. J. Ch. 330; L. R. 9 Ch. 350.
(4) [1874] L. R. 7 H. L. 39.

The proper order will be: Allow the appeal, and reverse the judgment appealed from. Declare that the three defendants—Margowski, Cohen, and Sworn—were guilty of a breach of their duty as directors in not paying to the company, in respect of the shares allotted to them on July 5th, 1897, 3s. per share, being the amount which they obtained from the other members of the company in respect of shares allotted to them, and let the plaintiffs have liberty to apply for an order for payment if necessary. Order the three defendants to pay the costs of the appeal, and also the costs of the action, except such costs as have been occasioned by the charges of fraud, which costs are to be paid by the plaintiffs. The usual set-off as regards these costs.

RIGBY, L.J. and VAUGHAN WILLIAMS, L.J., arrived at a like result.

Director. Qualification Shares. "Own Right."

COOPER v. GRIFFIN.

L. R. 1892, 1 Q. B. 740.

THE COURT OF APPEAL

The facts sufficiently appear from the judgment of LORD HERSCHELL.

LORD HERSCHELL:—This is an appeal from a decision of a Divisional Court, discharging an order which charged the judgment debtor's interest in shares which stood in his name on the register of a limited company. There is no question that 300 shares are standing in his name as registered owner. The statute 1 & 2 Vict. ch. 110, sec. 14, authorizes the making a charging order in respect of shares standing in the name of the judgment debtor "in his own right," or in the name of any person in trust for him. The question is raised what is the meaning of the words "in his own right." It is not necessary to decide what in the abstract is their meaning; they may have different meanings according to the context. Here they occur in juxtaposition with shares standing in the name of another person in trust for the judgment debtor, in an enactment the object of which was to charge shares in which a judgment debtor had a beneficial interest. Here the judgment

debtor had 300 shares standing in his name; but three persons allege that he held the shares in trust for them. If that allegation is established, and its truth (apart from the question whether the trust was legal) cannot be doubted, then the case is not within the statute. It is not disputed that these shares were the property of Posno and two others, and that they were transferred into the name of the judgment debtor without any intention of passing more than the legal ownership. The transfers having been made and registered, the debtor executed and delivered to the owners blank transfers of those shares, but he remained on the register. So far there is a clear case of trust. But the judgment creditor sets up the case that though the shares were transferred to the judgment debtor with the intention of only passing the legal interest to him as trustee, the trust was illegal, as it was made in order to qualify the judgment debtor as a director. The fact is beyond dispute. The articles provide that a director must hold 300 shares "in his own right," and the judgment creditor says this means that he must be beneficial owner of them, and that otherwise he is not qualified; he says that when the three respondents transferred to the judgment debtor, they must be taken to have falsely represented that he was the beneficial owner; that being parties to an illegal transaction they could not enforce the trust; and that, therefore, if the transferors had come to the Court to prevent the judgment debtor from dealing with the shares as his own, they must have failed; and that as the judgment debtor could have insisted on keeping the shares as his own, they must be treated as belonging to him absolutely.

The first question is what is the meaning of article 67 of the expression "in his own right." The meaning of a similar article was considered by the late Master of the Rolls in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1) Perhaps it was not necessary for the decision of the case before him to lay down that those words did not require the director to be beneficial owner of the shares, for Pulbrook was beneficial owner subject to a mortgage; but the Master of the Rolls put the case on a broader ground. I am not sure whether the decision might not be put on a reasonable basis without going so far as he did, but it is not necessary to decide that question. His Lordship held the words were not introduced to shew that the director must be beneficial owner, but to negative his holding the shares in a representative character. This decision, which was in 1878, remained unquestioned till 1889, when it was discussed in *Bainbridge* v. *Smith.* (2) Cotton, L.J.,

(1) 9 Ch. D. 610. (2) 41 Ch. D. 462.

expressed dissent from the construction adopted by the Master of the Rolls. Lindley, L.J., intimated a doubt whether if it had been *res integra* he should have taken the same view as the Master of the Rolls, but considered that as the words were in common use and had acquired in consequence of that decision a conventional meaning which had been accepted and acted upon, it would not be safe now to depart from it. So stands the case upon the authorities.

I do not intend to express any opinion whether treating the matter as *res integra,* the view of the Master of the Rolls was right; but I agree with Lindley, L.J., that having regard to the constant transactions depending on the construction of articles of association, it would be dangerous to interfere with a decision which has remained unquestioned for so many years. To do so would be an injustice to persons who have acted on the faith of the decision.

In the present case, I think that the arrangement for qualifying the judgment debtor was not in any way illegal. The opinion given by the Master of the Rolls as to the meaning of a similarly worded rule justified the respondents in the course they took. The most that could be contended for is, that they were mistaken as to what was necessary in order to confer a qualification; it cannot be said that they intended a fraud. It cannot, in my opinion, be established that the *cestuis que trust,* if they came to a court of justice, would be told, "You cannot have any relief, for you contrived a fraud."

But suppose it could be established that the Court would have refused relief to the *cestuis que trust,* it does not follow that the creditor of the trustee can attach the trust property. There may be a case where a trust cannot be enforced, but where it would be dishonest not to hold the property upon the trust. Can it be said under these circumstances, where the trustee ought not to keep the property for his own, that his creditor can come in and say that it was the trustee's own property? The creditor, in my opinion, cannot claim more than the trustee could honestly have given him. Here, even if the *cestuis que trust* could not enforce the trust, still it would not be honest in the trustee to repudiate it, and in my judgment his creditor cannot attach the property.

LINDLEY, L.J., and KAY, L.J., expressed themselves to the same effect.

Director. Qualification Shares. "Own Right."

BOSCHOEK PROPRIETARY CO. v. FUKE,

1905, 75 L. J. Ch. 261.

SWINFEN EADY, J.

The case involved several points. As to that now of interest the judgment discloses the facts and is as follows:

SWINFEN EADY, J.:—* * * The question, however, has been raised as to whether Fuke was qualified to be appointed a director. By article 75 any occasional vacancy in the office of director may at all times be filled up by the board by the appointment of a qualified member. By article 66 the qualification of a director is the holding in his own right of at least 250 shares, and by article 72 every director shall vacate his office on ceasing to hold his qualifying number of shares. It was contended that article 66 only required a qualification in the case of the first directors appointed by the subscribers to the memorandum, but, having regard to articles 72 and 75, the contention is not in my opinion well founded. Then was Fuke "a qualified member"? The 500 shares which are claimed as a qualification were entered into the company's register as follows: "Francis George Fuke, liquidator of the Heidelburg Estates and Exploration Company (Limited), 167 Winchester House, Old Broad Street, London." Did Fuke hold these shares "in his own right"?

In *Bainbridge* v. *Smith* (1) Lord Justice Lindley pointed out that the phrase "holding shares in his own right" had acquired a conventional meaning, and added: "I think that conventional meaning is this, that a person 'holding shares in his own right' means holding in his own right as distinguished from holding in the right of somebody else. * * * It means that a person shall hold shares in such a way that the company can safely deal with him in respect of his shares whatever his interest may be in the shares."

I therefore ask myself these two questions: First—Did Fuke hold in his own right, as distinguished from holding in the right of somebody else? and secondly, Could the plaintiff company have safely dealt with him in respect of these shares, whatever his interest in the shares might be?

(1) [1889] 41 Ch. D. 462, 474.

In my opinion the first question should be answered in the negative. Fuke held the shares in the right of the Heidelburg Estates and Exploration Co., Lim., and not in his own right. Suppose he had been described on the register of the company as "F. G. Fuke, trustee of A. B., a bankrupt," or as "F. G. Fuke, executor of C. D., deceased," in neither case would he have held shares in his own right, but in the former case in right of the bankrupt, and in the latter in right of the testator. So in the present case the description of him on the register as "liquidator of the Heidelburg Estates and Exploration Company, Limited," shews that he held the shares in right of that company, and in his capacity as liquidator of that company. If, on the other hand, he had been registered as "F. G. Fuke, or, &c., accountant," he would have held the shares in his own right within the meaning of the decisions, although he might in fact have been trustee of a bankrupt, or executor of a deceased person or liquidator of a company. In the present case I am not considering whether it is usual or proper for a shareholder to be put upon the register with the description "trustee of A. B., a bankrupt," or "executor of C. D., deceased," or "liquidator of the X Company." I am only considering what is the effect of such a registration.

I am also of opinion that the second question, previously mentioned, should be answered in the negative. The plaintiff company could not safely deal with Fuke in respect of the 500 shares, whatever his interest might be in the shares, as it had notice that he held them as liquidator of the Heidelburg Company. Suppose the plaintiff company had taken them as a security for an overdue debt owing by Fuke personally, could the company have pleaded that it took them in good faith, and without notice that they belonged to the Heidleburg Co., of which Fuke was liquidator? Certainly not: the plaintiff company's own register shews that it was as liquidator of the Heidleburg Co. that the shares stood in Fuke's name. In like manner, if the shares had been registered "F. G. Fuke, executor of C. D., deceased," the plaintiff company could not have taken them by way of security from F. G. Fuke for a private debt of his own, and then successfully contended that it had no notice that Fuke was only entitled to the shares as executor of a deceased person. If, on the other hand, the shares had been registered simply "F. G. Fuke, or, &c., accountant," then the plaintiff company could have safely dealt with Fuke on the footing that he held the shares in his own right, even though in point of fact he might have held them as executor of a deceased person or liquidator of a company. (See also *Sutton* v. *English and Colonial*

Produce Co.) (2) I decide, therefore, that the 500 shares were not a qualification for Fuke within the meaning of the articles.

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Director. Qualification Shares. Secret Indemnity Agreement. Misfeasance. Remedy.

IN RE NORTH AUSTRALIAN TERRITORY COMPANY, ARCHER'S CASE.

L. R. 1892, 1 Ch. 322.

THE COURT OF APPEAL.

The facts are set forth in the judgment of

LINDLEY, L.J.:—This is an appeal from an order of Mr. Justice Kekewich, deciding, in substance, that a gentleman of the name of Archer ought not to be ordered to pay to the company a sum of £500 in respect of money which he is alleged to have received, and to be accountable to the company for, under the 10th section of the Companies (Winding-up) Act, 1890. It is as follows: "Where, in the course of the winding-up of a company under the Companies Acts, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just." That section is substituted for a similar section, the 165th, in the Companies Act, 1862.

(2) 71 L. J. Ch. 685; [1902] 2 Ch. 502.

Now, it has been settled by various decisions, and particularly by the case in the House of Lords of *Bentinck* v. *Fenn* (1), that the 165th section does not impose new liabilities; it only provides a summary method of doing, by an order in the winding-up, that which might be done by means of an action at law or a suit in Chancery. But it has never yet been decided that, when you are dealing with a director of a company, if you find that he is accountable to the company in such a way that he could be compelled either by action at Law or by suit in Equity to hand over all that the company claims from him, you cannot get it by this summary method. The object of the section is to substitute a summary procedure for a more lengthy one.

With those observations I will proceed to consider who Mr. Archer was, and what the facts in this case are, so far as they are admitted; for really, as to the facts, there is very little in controversy. The company itself appears to have been formed in 1887, and one of its objects, as disclosed in the memorandum of association, was to purchase some property in Australia which belonged to a gentleman of the name of Fisher. One of the articles declared that the directors should be qualified by each holding fifty fully paid-up shares. Mr. Fisher had a friend of the name of Murray Smith. What position Mr. Murray Smith was in towards Mr. Fisher we do not know; but Mr. Archer knew that Mr. Murray Smith was, in fact, the agent of Mr. Fisher. Mr. Archer tells us that in his own deposition on cross-examination. He also knew, from a letter written by Mr. Murray Smith to himself, and dated the 3rd of May, 1887, that Mr. Murray Smith was a promoter of this company. He knew the facts. Mr. Murray Smith, knowing Mr. Archer, requested him to become a director. Mr. Archer apparently had no particular desire to become a director, but he agreed to become a director upon certain terms, which were that Mr. Murray Smith should, in fact, relieve him of his shares if he desired to part with them, and relieve him at par. The letter which contains this arrangement is dated the 13th of May, 1887; it is from Mr. Murray Smith to Mr. Archer, and runs thus: "Dear Sir,—Should you desire at any time to part with the fifty shares in the North Australian Territory Company which you are about to take, I undertake to purchase them from you at the same price which you pay for them." That letter was accompanied by another written by Mr. Murray Smith to Mr. Archer, and which other letter requests Mr. Archer to say nothing about this. Mr. Archer becomes a director;

(1) 12 App. Cas. 652, 669.

he qualifies himself; he takes fifty shares; he pays for them in full out of his own pocket; he acts as director for some time, rather more than a year, when, as he is about to go abroad, he resigns, and desires to get rid of his shares, which, as the evidence shews, were not then worth a farthing. He thereupon requests Mr. Murray Smith to act upon the letter I have read, and to take the shares off his hands at par. Mr. Murray Smith does so, pays him the £500, and so completes his part of the bargain.

Those are the facts which are beyond all controversy. I will now allude to one or two as to which I do not say there is a controversy, but as to which there is a suggestion of controversy. It is suggested that there is no evidence, on which the Court ought to act, that Mr. Archer did not disclose this agreement to his co-directors. It is pointed out that the House of Lords has said it is incumbent on the liquidator to make out his case. So it is, of course; but having regard to the indisputable fact that Mr. Archer was requested to keep the matter quiet, having regard to the fact that there is not a trace to be found in the company's books or any where else of any intimation to anybody that the agreement existed, having regard to the fact that Mr. Archer when he was cross-examined never suggested that he told anybody about it, and having regard to the fact that the liquidators first heard of the agreement in the course of Mr. Archer's cross-examination, the inference I draw as matter of fact is that it is proved that this was not disclosed at all. It is obvious that it was not.

Now, that being so, the question arises whether this £500 can be regarded as payable by Mr. Archer to the company? Can the company claim it upon any recognised principle of Law or of Equity? My answer is, unquestionably the company can; and the principle upon which I rely in support of that opinion cannot be better stated than it was by Lord Justice Mellish in *Hay's Case* (2). He says (3): "There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. It is perfectly settled law that that rule applies with peculiar stringency to the directors of joint-stock companies who are the agents of the company for effecting the sales or the purchases made by the company." Then the Lord Justice goes on to say that the only question in that case was whether Sir John Hay came within that principle. Now, Mr. Renshaw and Mr. Butcher have argued that that principle is not

(2) Law Rep. 10 Ch. 593. (3) Law Rep. 10 Ch. 601.

applicable to this case; and they put it in this way, and very forcibly; they say that this is a new case—and I think it is, as regards details. They say that there was nothing got from the company by Mr. Murray Smith, or by Mr. Archer through Mr. Murray Smith. I do not know whether that was the case or not: I am not going to speculate whether it was; but Mr. Murray Smith unquestionably was a promoter acting in the interests of the vendor: there is no question whatever about that. But even supposing that Mr. Murray Smith got nothing directly or indirectly out of this company, can it be right, considering the position of a promoter and the position of a director, for a promoter to put a director in the position in which Mr. Murray Smith put Mr. Archer? What is the object of having a stipulation in the articles that a director shall hold qualification shares? It is, of course, to give him a personal interest in the affairs of the company, and to induce him to attend to them in a way very different to what he would do if he had no interest in them at all; and if there is a board of directors, some of whom have acquired that interest which they are intended to have, and some of whom have not because they have bargained to be indemnified against all possible loss, can it be said that a bargain like that is one which is justifiable between a promoter and a director, and one which does not bring the director within sec. 165, if he receives anything by virtue of that bargain? It seems to me that such a bargain as that in the present case is entirely fraudulent—fraudulent, I mean, in this sense, that it was putting Mr. Archer in a position in which, as a director, he was never intended to be put by the articles or by the constitution of this company.

It is said, further, that there was no loss to the company. Now, that is quite true if you look at the matter from one point of view; but it is not true if you look at it from another. It is quite true that the company, having received £500 in respect of these shares, have not lost anything by issuing those shares to Mr. Archer. That is perfectly true; but when it is said that there is no loss to the company, that is really begging the question. If this money which Mr. Archer got from Mr. Murray Smith ought to be accounted for to the company, the company loses if they do not get it.

Then it is said that there is no profit to Mr. Archer. That, again, depends upon the point of view from which you regard the matter. If you look at his position at the beginning of the transaction, he has made no profit out of it. He paid £500 for his shares, and has got £500 back; but if you look at his position at the time he got the £500, he made a very large profit. The shares were

his; the shares were not worth £500; the shares were not, in fact, worth a farthing, and he got £500 for them. If he is accountable to the company in respect of that sum, what is his retention of it but a loss caused to the company, which they seek to avoid by making him liable?

Then it was said there is no dishonesty in the case. I do not pursue that point further; I have said quite enough about it in my observations respecting the arrangement in general, which is not creditable, to say the least of it.

Now, that being the case, why does it not come within the principle to which I have alluded, and which is explained in the passage I have read from the judgment of Lord Justice Mellish? Has not Mr. Archer obtained, in respect of his agency, a sum of money which, upon the principle which I have endeavoured to explain, is payable by him to the company. To say it is the company's money is to use an ambiguous expression. In one sense it may be said to be the company's money—that is to say, in the sense that the company are entitled to get it. In another sense it is not the company's money—that is to say, the company cannot follow it into investments of it, nor, in the event of Mr. Archer's bankruptcy, could they withdraw the money from his assets instead of ranking as creditors against his estate. The difference is explained in *Lister & Co.* v. *Stubbs* (4). Then it is said that the 165th section has been expounded in *Coventry and Dixon's Case* (5) and *Bentinck* v. *Fenn* (1) in such a way as not to entitle the liquidators to recover this money, at all events in this form. Upon that point I will turn to what Lord Herschell said in *Bentinck* v. *Fenn* (1), and shew why that case failed in the House of Lords. It was an application under the 165th section against a vendor of a company, who was also one of its directors, to compel him to pay to the company certain moneys which he was alleged to have got from the company in excess of the value of the land. The view taken by the House of Lords upon the facts, of course, I do not discuss. I take the facts as they find them. It was held that the application must be dismissed on two grounds—namely, that the evidence adduced by the applicant failed to shew that the director had not disclosed his interest, and also that the evidence failed to shew that the purchase price was above the value. Now, taking the facts in that case as established, it follows that the director there, Mr. Fenn, had not received any money at all which could be claimed; and, of course, if you once arrive at that, then the observations made by Lord Herschell become

(4) 45 Ch. D. 1.

(5) 14 Ch. D. 660.

perfectly intelligible. The present case proceeds upon the ground that Mr. Archer has, in fact, received money to which the company is entitled, and the observation, therefore, that there has been no loss by the company, or that the liquidator, creditor, or contributory cannot take out a summons under sec. 165 unless he shews that the breach of duty has resulted in loss to the assets of the company, and that he has a direct pecuniary interest in the success of the application, is inapplicable to this case. In *Bentinck* v. *Fenn* (1) the decision of the House of Lords was based upon this, that an applicant under the 165th section was bound to prove, not merely a breach of duty on the part of a director, but also that the breach of duty had resulted in loss to the company. If there is no loss, of course, there is nothing to recover, and the decision of the House of Lords in that case shewed there was nothing to recover. Why? Because Mr. Fenn, not having received, ought not to be called upon to pay, anything. But if you once arrive at the conclusion that the person proceeded against has received money to which the company is entitled and does not pay it over, the observations of Lord Herschell have no real bearing on the present case. It seems to me, therefore, that this case is within the principle laid down in *Hay's Case* (2) to which I have alluded. Although, in one sense, the company have not lost money, yet in another sense they have been kept out of that which they have a right to receive; and although, in one sense, Mr. Archer has not made any profit out of this transaction, yet in another and a very real sense he has, and that profit belongs to the company and not himself.

I think the learned Judge has failed to arrive at the right decision in this case, and that Mr. Archer ought to be ordered to repay the £500.

Bowen, L.J., and Fry, L.J., delivered judgments to the same effect.

Directors. Misapplication of Assets of Company. Presents to Directors. Payment for Services.

IN RE GEORGE NEWMAN & CO.

L. R. (1895) 1 Ch. 674.

THE COURT OF APPEAL.

LINDLEY, L.J., in delivering the judgment of the Court, in part, said:

* * * In this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it, they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion. All this is familiar law and must be borne in mind in deciding the present case. Mr. George Newman and his co-directors evidently ignored their legal position entirely. They regarded Mr. George Newman as the company, and it never seems to have occurred to them that he and his brothers could not do as they liked with what they regarded as their own property, or rather as his, for he and his children held the bulk of the shares. If this view were correct in point of law, if the corporate body could be disregarded, it would follow that Mr. George Newman and his brothers would be liable without limit for the debts which were contracted in the name of the company. This would be a just and proper result to arrive at; but the Court is precluded

by the terms of the Companies Act, 1862, secs. 191, 192, from adopting it. The Court is bound to recognize the company as incorporated, and to give effect to all the consequences of such incorporation. What then, are the consequences as regards presents to directors? The cases on the subject are few. The law will be found discussed in *York and North Midland Railway Company* v. *Hudson* (1) and *Hutton* v. *West Cork Railway Company* (2), but there is no case which quite covers this. Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was even held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done, such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorize such presents as those impeached by the liquidator; and the result is that his appeal must be allowed as to £3,000, part of the £10,000, and as to the £3,500, and Mr. Newman must be ordered to pay these sums, with interest at 4 per cent.

(1) 16 Beav. 485. (2) 23 Ch. D. 654.

Directors. Personal Interest in Concern. Contracting with Company.

COSTA RICA RAILWAY v. FORWOOD.

1901, 70 L. J. Ch. 385.

THE COURT OF APPEAL.

Action for an account for secret profits alleged to have been received by a director.

VAUGHAN WILLIAMS, L.J.:—* * * Going back to the arguments which have been urged upon us, I do not suppose that it was intended directly to question the stringency of the rule which does not allow directors, trustees, agents, or others standing in a fiduciary relation to enter into engagements conflicting, or which might possibly conflict, with the interest of those whom they are bound to protect. But although no actual question was raised as to that, it seemed to me that really a great deal of the argument suggested things of this sort: "If Sir Arthur Forwood was interested in a way which made it impossible to deny that he might possibly have an interest which might conflict with his duty, yet it would be wrong to hold him accountable here, because it really would not be fair to do so," or "because really the company of which he was a director has lost nothing," or "because the profit which he has earned here is really a profit which could not be earned by the company." As I understand it, a whole series of partnership cases was read to us in order to shew that a partner could not be responsible for profits which his firm could have gained. All I can say is, that it seems to me, without going at length into authorities, that there is no sort of ground for any such contention. There is one case which was not cited during argument, and which there was perhaps no need to cite, because there was ample other authority to the same effect, but which I am going to refer to for one moment for what I may call a text-book reason—that is to say, that you find in the headnote an admirable summary of the law, and when you come to look at the speeches of the noble Lords, you will find that every word of the headnote is justified by their speeches. I am referring to the case of *Aberdeen Railway* v. *Blaikie Brothers* (1). It is stated so shortly there, that I think it would not be undesirable to read passages from that headnote: "It is a rule of universal

(1) [1854] 1 Macq. H. L. 461.

application that no trustees shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object. It may be that the terms on which a trustee has attemped to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted." As I understand, the rule is a rule to protect directors, trustees, and others against human nature by providing that if they choose to enter into contracts in cases in which they have, or may have, a conflicting interest, the law will denude them of all profits they make thereby, and that notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their *cestuis que trust,* and although the profits may be such that their *cestuis que trust* could not have earned them at all. I may say, with reference to that last point, that there is a recent and direct decision that the fact that the profits could not have been earned by the *cestui que trust* is wholly immaterial, and that is the case of the *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2).

I should like to preface my observations also by saying this: that counsel for the appellants perfectly satisfied me by the authority of the case of *Dunne* v. *English* (3), that if the liability of the director, or trustee, or agent to account depends upon disclosure, the disclosure must be a full disclosure, and that it is not sufficient for the person in a fiduciary capacity to say: "I gave you fully sufficient information to put you upon enquiry." And I suppose, moreover, that, generally speaking, it would not be sufficient for the director of a company to shew that, as between himself and his brother directors, the whole matter was above-board. I think that that was established by a case of *Albion Steel and Wire Co.* v. *Martin* (4).

The learned Lord Justice held the director exempt from fault under the special facts and the terms of the articles of association of the company.

The other Lords Justices also reached this conclusion.

(2) [1888] 39 Ch. D. 339. (3) L. R. 18 Eq. 524.
(4) [1875] 45 L. J. Ch. 173; 1 Ch. D. 580.

Directors' Powers of Management. Right to Question Validity of Directors' Actions.

HOVEY v. WHITING.

1886, 14 S. C. R. 515.

THE SUPREME COURT OF CANADA.

The questions raised included (1) Whether the directors of a joint stock trading company could bind the company by making an assignment for the benefit of creditors, and (2) Whether an execution creditor could raise the question of validity of the deed.

SIR W. J. RITCHIE, C.J.:— * * * With reference to the first proposition, that the directors had no right to assign the property to trustees for the payment of their debts, I am clearly of opinion that they not only had the right to do it, but that, whenever they found the company were unable to meet their engagements and were in an unquestionably insolvent condition, and that individual creditors were seeking to obtain judgments by which they might sweep away from the body of the creditors, for their individual benefit, the assets of the company, they not only had the right, but it was their bounden duty, in honesty and justice, to take such steps in their management of the affairs of the company entrusted to them by law as would preserve the property for the general benefit of all the creditors without priority or distinction, and this without any special statutory provision, upon general principles of justice and equity, and without the formal sanction of the whole body of shareholders. The board of directors, in my opinion, has unlimited powers over the property of the corporation so to deal with it as to pay the just debts of the corporation.

STRONG, J.:—I entirely concur in the judgment delivered in the Court of Appeal by the learned Chief Justice of that Court so far as the same relates to powers of the directors; and I particularly agree in that passage of his judgment in support of which he cites the observations of Blackburn, J., in the case of *Taylor* v. *Chichester Ry. Co.* (1). See note (a), *infra.*

And the rest of the Court agreed.

(1) L. R. 2 Ex. 356.

HAGGART, C.J.O., in the Court of Appeal, said:—

I find it hard to divest myself of the idea that the objection here urged as to the non-assent of stockholders does not properly come from these defendants.

On this, I should refer to the very instructive remarks in the judgment of Blackburn, J., in *Taylor* v. *Chichester R. W. Co.* (2). He points out the difference between objections raised by the shareholders as *ultra vires* of the directors to bind them, and the objections of third parties. This case was in 1867, before the Judicature Act:

"I think that any objection made only on the ground that it affects the interest of the shareholders can only be made on behalf of the shareholders, and, therefore, cannot be raised in a Court of law at all, but must if, raised, at all, be raised in a Court of equity. It might perhaps be enough to say that on this record there is no allegation that there is any shareholder who did not acquiesce in the promoting of this bill, but I think no such allegation would have made the plea good at law, as the objection would concern no one but the shareholder, who is not and cannot be a party to the action at law."

It seems to me that it was in these proceedings the business of the shareholders on their own behalf to actively interpose to restrain this action of their directors, and that it is not the right of these defendants to raise it on their own behalf.

Internal Procedure of Company. Irregularities. Position of Mortgagee under Mortgage Defectively Executed. Effect of Notice or its Absence.

COUNTY OF GLOUCESTER BANK v. RUDRY MERTHYR STEAM AND HOUSE COAL COLLIERY COMPANY.

L. R. 1895. 1 Ch. 629.

THE COURT OF APPEAL.

The directors of a joint stock company had power under their articles to fix the number of directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of

(2) L. R. 2 Ex. (in Error) 378.

directors at which two only were present, authorized the secretary to affix the company's seal to a mortgage, which was accordingly done by the secretary in the presence of the same two directors.

The validity of the mortgage being questioned the case came ultimately before the Court of Appeal wherein the following judgment was delivered by

Lord Halsbury, L.C.:—Upon the point that has been argued last, but which stands first in order, namely, whether this was a valid mortgage or not, I am of opinion that nothing has been urged before us which would induce us to hold that the authority of the company was not given to the making of this mortgage; at least in this sense, that an outside person, who had no other means of knowledge, was entitled to regard the company as having performed its functions in the making of this mortgage by whatever means it could lawfully do so. The case relied on by the respondents—*D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (1)—was a case in which a bond given by a company was held not to be the bond of the company, for this, among other reasons, that, by a section in the company's special Act, the business of the company was to be conducted by directors and by a particular quorum prescribed by the special Act, and it was held that all persons dealing with the company were bound, therefore, to know what was in the provisions of the special Act in respect to that matter. If that case were identical in its facts with the case now before us, we should be bound by that decision; but I think the facts are not the same at all. Looking at the decision in *Royal British Bank* v. *Turquand* (2), and the case in the House of Lords, *Mahony* v. *East Holyford Mining Company* (3), they affirm a proposition of a very different character. Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if those public documents, which everyone has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company would only shew this, that by some regulations of their own, what Lord Hatherley described as

(1) Law. Rep. 2 Ex. 158. (2) 6 E. & B. 327.
(3) Law. Rep. 7 H. L. 869.

their indoor management, they were capable if they had thought right of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document sealed with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description. It turns out that their own internal regulation was that the number of directors should exceed two. But that is a matter which was known to them and to them alone. The only external fact with respect to the management of the company of which an outside person would be cognizant would be that they had power to make any quorum they pleased, and I think he would be entitled to assume that the proper quorum had been properly summoned, and had attended, to effect the completion of that instrument. That disposes of the first point as to the validity of the mortgage.

LINDLEY, L.J., and A. L. SMITH, L.J., on this point expressed themselves to like effect.

Internal Disputes. Right of Action of Shareholder Regarding Act of Majority. Conditions of.

MACDOUGALL v. GARDINER.

1875, L. R. 1 Ch. D. 13.

THE COURT OF APPEAL.

The articles of association of a company gave power to the chairman at any general meeting of the company, with the consent of the meeting, to adjourn the meeting, and also provided for taking a poll if demanded by five shareholders. At a general meeting of the company the adjournment of the meeting was moved, and, on being put, was declared by the chairman, who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders filed a bill on behalf of himself and all other shareholders except the directors, against the directors and the company, stating these facts, and alleging that the course taken at the meeting was taken

in collusion with the directors, with a view of stifling discussion, and that the directors were intending to carry out certain measures injurious to the company without submitting the terms to a general meeting; and praying for a declaration that the conduct of the chairman was illegal and improper, and for an injunction to restrain the directors from carrying out the proposed arrangements without submitting them to the shareholders for their approval.

Defendant demurred. Malins, V.C., overruled the demurrer.

Defendant appealed.

JAMES, L.J.:—I am of opinion that this demurrer ought to be allowed. I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley* v. *Alston* (1), and *Lord* v. *Copper Miners' Company* (2), and *Foss* v. *Harbottle* (3) should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of the company *quâ* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done. If the majority of the company really are in favour of any particular shareholder who has been interfered with improperly, by misconduct of a director, by misconduct of a chairman, by miscarriage of a meeting or of certain shareholders at a particular date—if the company think that any shareholder has anything which ought to be made the subject of complaint, there is never any difficulty whatever arising from the apparent possession of the seal by the directors, or from any such cause, in filing a bill in the name of the company, if the majority of the company desire it to be filed. Any one of the

(1) 1 Ph. 790. (2) 2 Ibid. 740.
(3) 2 Hare, 461.

shareholders might have filed his bill in the name of the company, and then if the directors had said, "You are not the company; the majority do not act with you, but with us"—the Court would, as it has done in other cases, have taken the means of ascertaining which party it is, the plaintiff's or defendant's, which really represents the majority of the company.

Everything in this bill, as far as I can see, if it is wrong is a wrong to the company, because every meeting that is called must be for some purpose or other—it must be for the purpose of doing or undoing something which is supposed to accrue for the benefit of the company. Whether it ought to have been done, or ought not to have been done, depends upon whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the thing should be done, or should not be done, or left unnoticed. I cannot conceive that there is any equity on the part of a shareholder, on behalf of himself and the minority, to say, "True it is that the majority have a right to determine everything connected with the management of the company, but then we have a right—and every individual has a right—to have a meeting held in strict form in accordance with the articles." Has a particular individual the right to have it for the purpose of using his power of eloquence to induce the others to listen to him and to take his view? That is an equity which I have never yet heard of in this Court, and I have never known it insisted upon before: that is to say, that this Court is to entertain a bill for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *viva voce* at a meeting of the shareholders. If so, I do not know why we should not go further, and say, not only must the meeting be held, but the shareholders must stay there to listen to him and to be convinced by him. The truth is, that is only part of the machinery and means by which the internal management is carried on. The whole question comes back to a question of internal management: that is to say, whether the meeting ought or ought not to be held in a particular way, whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed,

the company are the proper persons to complain of that. It seems to me, therefore, that the thing is perfectly plain and obvious, and when the Master of the Rolls had the case before him he immediately pointed it out, and said, "You have the wrong plaintiff here—the plaintiff must be the company." From the first opening of this case before us, I have never had any doubt in my own mind that this was a bill which, if it was to be sustained at all, could only be sustained by the company.

But then the plaintiff says, "Give us leave to amend." It is rather late to ask for leave to amend when the amendments might have been obtained from the Master of the Rolls before any costs had been incurred. But the question is, is there anything substantial in this case on which we should give leave to amend on the part of the company? I can see nothing. I do not think we ought to give leave to amend for the purpose merely of getting a declaration as to what the proper mode of dealing with the adjournment was, because that would be simply to give a declaration without any relief. The company cannot file a bill saying, "Tell us the meaning of the Rules, and what is to be done under them." They must find that out for themselves in the best way they can. We do not sit here to express an opinion on something which may lead to no practical result. I am not aware that there could be any practical result following upon a declaration obtained by the company as to the particular mode in which the meeting ought to have been adjourned, or in what particular way the meetings in future should be adjourned. If there is any doubt about it, if they cannot satisfy themselves as to the way of doing it out of doors, they must call a meeting and make it clear what is the mode in which they wish and propose to have it done. * * *

MELLISH, L.J., and BAGGALLAY, J.A., each delivered judgment to the same effect.

See *Alexander* v. *Automatic Telephone Company, supra*, p. 96.

Internal Procedure. De Facto Officers. Ostensible Authority.

IN RE COUNTY LIFE ASSURANCE COMPANY.

1870, L. R. 5 Ch. 288.

THE COURT OF APPEAL.

In 1863 the County Life Assurance Company was registered. In the articles certain persons were named as first directors, with power to add to their number, until the first general meeting. Preston was named as first manager, or managing-director. Policies were to be executed by three directors, and the whole control of the company was to be in the hands of the directors. The directors named in the articles, being dissatisfied with the constitution of the company, refused to carry on business, and passed a resolution that nothing should be done in the affairs of the company, and no meetings should be held. Notwithstanding this, Preston and one of the subscribers of the memorandum, other than the directors, took steps to carry on business. They elected new directors, issued and allotted shares, registered offices, made a seal, and granted policies.

Upon a claim being made in winding-up proceedings under a policy so issued, the validity of the policy was contested. The Master of the Rolls sustained the claim and on appeal judgment was pronounced by

Sir G. M. Giffard, L.J.:—It certainly is marvellous that a company such as this should have been able to carry on business to the extent of having 350 policies and upwards effected with it. However, the evidence on both sides seems to admit that that is the fact, and what I really have to decide is, whether or not a person who holds one of those policies has a right to prove against this company; the company, and no one else, being on this occasion the appellants.

As far as the facts go, they lie in a very small compass:—[His Lordship then shortly referred to the facts as stated above, and continued:—] That is the internal history of the company; and before I go further, I may say that the directors of this company, at any moment they chose, might have got an injunction—at any moment they chose they might have put an end to this company. They did not choose to do so, and it is not too much to assume

against them that they knew that the company had a place of business, and that Mr. Preston intended to commence and did commence operations.

In that state of things the respondents who make this claim effected a policy duly and properly in the usual course of business. They knew nothing about the internal arrangements of the company; they were not aware that anything irregular had taken place; they were not aware that the directors had refused to act, or of any one of those circumstances which are detailed in this evidence. If we look at the policy, the policy, on the face of it, is effected in accordance with the articles. No one looking at the articles, and reading the policy, could know, or suspect, or believe otherwise than that the policy was as duly effected as any policy you might have from the Equitable, or any of the other large companies in London. I take the law, as deduced from the authorities, to be plainly this: In the first place, a stranger must be taken to have read the General Act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the company that all matters of internal management have been duly complied with.

The company is bound by what takes place in the usual course of business with a third party where that third party deals *bonâ fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*. In this case the ordinary correspondence takes place, then the applicant goes to the office and gets from the office a document which appears, on the face of it, to be executed according to the terms of the articles, and which has to it a seal which purports to be the seal of the company, that seal being put by three persons who represent themselves to be directors, and who are *de facto* directors, and countersigned by the person who was *de facto* secretary. I do not hesitate to say that the business of companies of this description could not possibly be carried on if this was not held to be the law. I must therefore dismiss this application with costs.

Prospectus. Exaggeration. Misrepresentation.

THE CENTRAL RAILWAY COMPANY OF VENEZUELA v. KISCH.

1867, 36 L. J. Ch. 849.

THE HOUSE OF LORDS.

Bill to set aside contract to purchase shares on the ground that there had been omission to state in the prospectus, on which plaintiff relied, material facts affecting the company.

In the course of his judgment it was said by the Lord Chancellor (LORD CHELMSFORD):

* * * The alleged representations are contained in a prospectus, the object of which was to invite the public generally to join the proposed undertaking. In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospectuses which are always held out by the originators of every new scheme without considerable abatement.

But although, in its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, yet no mis-statement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements. As was said by Vice Chancellor Kindersley, in the case of *The New Brunswick and Canada Railway Company* v. *Muggeridge* (1), "Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with

(1) 1 Dru. & Sm. 363; s. c. 30 Law J. Rep. (N.S.) Ch. 242.

strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

* * * But the appellants say that, even admitting the prospectus to be open to the objections which are made to it, the respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that "the engineer's report, together with maps, plans and surveys of the line, might be inspected, and any further information obtained on application at the temporary offices of the company," and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus. But it appears to me that when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty." I quite agree with the opinion of Lord Lyndhurst, in the case of *Small* v. *Attwood* (2), that "where representations are made with respect to the nature and character of property which is to become the subject of purchase affecting the value of that property, and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised, and in a Court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobel* v. *Stephens* (3), to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house and he might have had access to them if he thought proper.

(2) 6 Cl. & F. 233, 395.
(3) 3 B. & C. 623; s. c. 3 Law. J. Rep. K. B. 89.

Validity of Call. Requisites.

SHARP v. DAWES.

L. R. 2, Q. B. D. 26.

THE COURT OF APPEAL.

One shareholder was present in response to a notice of meeting. He assumed to pass a resolution making a call. The question of the validity of the proceeding came up.

LORD COLERIDGE, C.J.:—This is an attempt to enforce against the defendant a call purporting to have been made under sec. 10 of the Stannaries Act, 1869. Of course it cannot be enforced unless it was duly made within the Act. Now, the Act says that a call may be made at a meeting of a company with special notice, and we must ascertain what within the meaning of the Act is a meeting, and whether one person alone can constitute such a meeting. It is said that the requirements of the Act are satisfied by a single shareholder going to the place appointed and professing to pass resolutions. The 6th and 7th sections of the Act shew conclusively that there must be more than one person present: and the word "meeting" *primâ facie* means a coming together of more than one person. It is, of course, possible to shew that the word "meeting" has a meaning different from the ordinary meaning, but there is nothing here to shew this to be the case. It appears therefore to me that this call was not made at a meeting of the company within the meaning of the Act. The order of the Court below must be reversed.

MELLISH, L.J.:—In this case, no doubt, a meeting was duly summoned, but only one shareholder attended. It is clear that, according to the ordinary use of the English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholder at all had attended. No business could be done at such a meeting, and the call is invalid.

BRETT and AMPHLETT, JJ.A., concurred.

See on the subject of calls on shares the following cases herein:

Payment of Shares in Advance of Calls. Interest out of Capital.

LOCK & TROTMAN v. THE QUEENSLAND INVESTMENT AND LAND MORTGAGE COMPANY, LIMITED.

L. R. 1896, A. C. 461.

THE HOUSE OF LORDS.

Article 40 of the articles of association was as follows:

"The Board shall be at liberty from time to time as they think fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him, upon such terms in all respects as the board may determine."

(This article was in substance identical with clause 7 of Table A. to the Companies Act, 1862.)

The question here was whether the directors of the company could pay out of capital interest on sums paid up in advance of calls.

LORD HERSCHELL:—* * * It is not susceptible of contention that to do what sec. 7 of Table A provides for can be *ultra vires*. The legislature can never have enacted that if the company do not otherwise provide their articles of association shall be such as will provide for something *ultra vires*. The present case comes within the very terms of sec. 7 of Table A.

But then it is said that these terms must be qualified or limited, inasmuch as it never can be lawful to make a payment to a member in his character of member out of the capital of the company—that such a payment could only be made out of profits. My Lords, it seems to me that there is no justification for inserting any qualification or limitation in the very clear words used in sec. 7 of Table A.

But, besides that, I think it is a fallacy to speak of this payment of interest as being a payment made to a member in his character of member. As member he has no right to have that interest paid to him: he could not claim it. As member he was under no obligation to make the payments in consideration of which the company undertook to pay the interest. When, therefore, the company, although they received the money from a member, received it from him without any obligation upon him as a member to pay it, and undertook to make a payment

to him in consideration of it which they were not under any obligation to make to him as a member, it seems to me that it is manifestly erroneous to describe this as a payment made to a member in his character of member. If so, the whole argument falls to the ground.

Shareholder. Counterclaiming Rescission in Action for Calls. Winding-up Intervening.

IN RE GENERAL RAILWAY SYNDICATE, WHITELEY'S CASE.

1900, 69 L. J. Ch. 250.

THE COURT OF APPEAL.

On June 15th, 1896, Whiteley was allotted 5,000 shares in the company. On December 22nd, 1896, a call of 5s. per share was made, payable on January 10th, 1898.

On June 27th, 1898, the company issued a writ against Whiteley to enforce payment of the amount due for calls on his shares. On July 12th, 1898, the company took out a summons for leave to sign final judgment under the Rules of the Supreme Court, 1883, Order XIV. In July 15th Whiteley filed an affidavit in opposition to the application, in which he stated as his grounds of defence that he had been induced to apply for the shares by the misrepresentation of the company, and that he intended to counterclaim for a declaration that he was entitled to a rescission of the contract to take shares in the company and to have his name removed from the register of members. On July 20th he obtained unconditional leave to defend. On July 22nd, 1898, a petition to wind up the company was presented. On August 2nd Whiteley delivered his defence and counterclaim in the action, in which he raised the case of misrepresentation, and claimed rescission of any contract he might be found to have entered into to take shares, and the rectification of the register of shareholders by the removal of his name therefrom.

On August 3rd a winding-up order was made on the petition. The liquidator settled Whiteley on the list of contributories in respect of 5,000 shares. Whiteley took out a summons in the

winding-up that the list of contributories might be varied by excluding his name therefrom; and he asked for leave to proceed with his counterclaim for rescission.

WRIGHT, J., dismissed the application on the ground that Whiteley's counterclaim for rescission having been made after the presentation of the petition, it was too late; and that the affidavit filed by him in the action was not in itself a sufficient proceeding to set aside the contract to take the shares.

Whiteley appealed.

LINDLEY, M.R.:—This case raises a question which is novel, but I do not think that it is really difficult, although I am unable to come to the same conclusion as the learned Judge upon it.

We have to consider what effect the new practice introduced by the Judicature Acts has upon the rules which have been laid down over and over again upon this question of taking proceedings to get a name removed from the register of members of a company when winding-up proceedings are imminent. Unquestionably the old practice was settled, and the old rule was laid down by the Court in *In re Scottish Petroleum Co.* (1), the decision in which nobody quarrels with. It is very difficult for Judges to frame language which is adapted to all possible contingencies. They frame it with reference to the circumstances with which they have to deal.

The real question is this: whether what has taken place here is not equivalent for all practical purposes, and for all legal purposes, to taking proceedings to have the man's name removed from the register. My opinion is that when the principle is looked at, what has taken place is equivalent to that. Here is a person on the register of members, and *primâ facie* a shareholder, and before any petition to wind up was presented, an action was brought against him for calls, and a summons was taken out under Order XIV. That introduced the new practice. What was the effect? He had two courses open to him. He could, of course, have immediately commenced a cross-action. There is no doubt about that; but he could also not only defend the action, but put in a counterclaim raising the question of whether he was entitled to repudiate and rescind or not. There are now two ways of doing it. Under the old practice, there was not. A man could not get the right to rescind by simply defending an action for calls. That may account for

(1) [1883] 23 Ch. D. 413.

the decision of Lord Justice Rolt in *Ex parte Stevenson* (2). The appellant did not, as he might have done, bring an action to rescind, but he took the other alternative; he chose to defend the action, and claim his right to rescind in the action, and he applied for leave to defend—after the summons had been taken out he could not defend without leave—and I cannot help thinking that it would have been rather vexatious, considering he could do everything he wanted in one action, to start another. The affidavit which he filed in opposition to the summons shewed no defence at all apart from the right to rescind. It disclosed nothing else. It starts in a general way by saying that the deponent is not indebted. That goes for nothing, unless you can find some circumstances which throw light upon it, and give rise to some reason for supposing that that is a true statement. I disregard that, as being nothing at all. The whole of the rest of the affidavit shews nothing more nor less than a right to repudiate the shares and to have the contract rescinded, and it was upon that affidavit that the appellant obtained leave to defend.

It is true that the petition to wind up was presented before he could put in his counterclaim. If he had put in his counterclaim first, the case would not have been arguable, to my mind. The difficulty arises from the fact that he had not put in his counterclaim; but he had got leave to defend upon the affidavit to which I have referred, and that appears to me to be all that can be reasonably expected, to assert in a legal proceeding his right to repudiate these shares. That is the principle on which the Courts have acted in several cases. Whether *Ex parte Stevenson* (2), went a little too far or not it is quite unnecessary to consider. One can easily, by working it out, see that it might lead to very extraordinary results; because, supposing that in an action for calls the defendant pleaded that he had been induced to take his shares by fraud, and that question were tried out and he won, it would be very difficult to see how he could be made a contributory after that. No doubt the decision may be explained, but I say nothing more about it. We are asked to extend what Lord Justice Rolt did under the old practice to a case which has arisen under the new practice which has entirely altered the procedure. In effect, what the appellant has done has been sufficient to take the legal steps before the commencement of the winding-up to have his name taken off the register and the shares taken out of his name. That is

(2) [1867] 16 W. R. 95.

the substance of it. Therefore, upon this preliminary point I think that the order must be set aside.

VAUGHAN-WILLIAMS, L.J., and ROMER, L.J., agreed.

Calls. Winding-up. Set-off of Debt.

IN RE OVEREND, GURNEY & CO. (LIMITED) EX PARTE GRISSELL.

1866, 35 L. J. Ch. 752.

THE COURT OF APPEAL.

Mr. Grissell was the holder of eighty shares of £50 each, of which £15 per share had been paid up, in the company of Overend, Gurney & Co., now in course of voluntary winding-up. He was also a creditor of the company to the extent of £16,000. A call having been made, an application was, on the 1st of August, made on Mr. Grissell's behalf to Vice-Chancellor Kindersley at Chambers, that the liquidators might be ordered to pay to him a dividend upon the balance of the amount owing to him by the company after deducting the amount of the call. This application was refused; and on the following day another application was made on his behalf that the liquidators might be ordered to pay him a dividend upon the amount owing to him by the company, deducting from such dividend the amount of any unpaid call. This application was also refused, the learned Vice-Chancellor being of opinion that the principles of the law of partnership applied to the case, and that Mr. Grissell, therefore, could not prove his debt in competition with the other creditors who were not shareholders, and consequently that he would not be entitled to any dividend until all those creditors had been paid in full.

Mr. Grissell appealed.

THE LORD CHANCELLOR (LORD CHELMSFORD):—This is a motion by way of appeal, against two orders of Vice-Chancellor Kindersley, one order made on the 1st of August, dismissing an application by Mr. Henry Grissell, a shareholder of the company of Overend, Gurney & Co. (Limited), that the liquidators might

be ordered to pay to him a dividend upon the balance of the amount owing to him by the company for money lent by him to them, after deducting from such debt the amount of any call that should have been made on the shares held by him in the company; and another order made on the 2nd of August, dismissing a similar application by Mr. Grissell, that the liquidators might be ordered to pay him a dividend upon the amount owing to him by the company, deducting from such dividend the amount of any call that should have been made upon the shares held by him, and should not have been paid. The difference between the two applications is this: in the first, it was asked that the dividend might be paid upon the balance after deducting the call; and, in the second, that the dividend might be calculated upon the entire debt due from the company, and then the amount of the call be deducted from the dividend.

Both applications may be regarded as raising the question whether a shareholder, who is also a creditor of a limited liability company, is entitled either to set off or to have credit for so been made upon, but not paid by him, and to receive a dividend much of his debt as is equal to the amount of calls which have for the balance.

The question depends entirely upon the construction of the Companies' Act, 1862; for though it was made an argument whether these companies were or were not like ordinary partnerships, whichever way such a question may be decided, where a company is being wound up the rights and liabilities of the company and its shareholders must be regulated by the provisions of the Act.

In considering the questions involved in these applications, the primary intention of the legislature in the provisions relating to the winding-up of companies must be regarded. That intention is expressed in the 133rd section of the Act, being that "the property of the company shall be applied in satisfaction of its liabilities, *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company. Bearing this in mind, two questions arise for determination upon these applications: first, whether a member of a company, who is also a creditor, is entitled to be paid his debt *pari passu* with the other creditors, who are not members of the company, or only after the debts due to all these creditors have been paid; and, secondly, if such a member is entitled to be paid in common with the other creditors, how are

calls which are made upon him, in common with the other contributories, to be dealt with? Ought he to pay the full amount remaining unpaid upon his shares before receiving any dividend in respect of the debt due to him? Or, secondly, ought he, before receiving payment of any dividend, to pay up any calls that may have been made upon his shares? Or, thirdly, is he entitled to deduct the amount of calls which have been made upon, but not paid by, him from the debt which is due to him, and receive a dividend upon the balance?

As to the first question: the Companies' Act, 1862, appears to make no distinction between a creditor who is a member of the company, and one who is not. There is nothing to be found in it to limit the meaning of the general word "creditors." On the contrary, the act, in various parts of it, recognizes members of the company as creditors. It will be sufficient to refer for proof of this to the 7th qualification in the 38th section, and to the 101st section. The act would be a complete snare upon members of companies who are creditors if they were to be postponed to other creditors who are not members.

Members of companies being then entitled to satisfaction of their debts *pari passu* with the rest of the creditors, the second question, which I have stated, arises—How are the calls made upon them to be dealt with?

In the first place, I think that they cannot be required to pay up the full amount remaining unpaid upon their shares. The 75th section of the Act enacts, that the liability of any person to contribute to the assets of a company, in the event of its being wound up, "shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." Until the call is made, there is nothing more than a liability to contribute. This, indeed, creates a debt, but the debt does not accrue due till a call is made. The power to make calls is only to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves. But if the whole of the amount unpaid upon the shares were required to be paid up, more might be raised than would be requisite for these purposes, and it might be that a contributory thus paying in advance might lose all that he had so paid in the event of any of his co-contributories becoming insolvent.

The two remaining questions may be considered together. It appears to me to be quite clear that the amount of the call not paid, cannot be set off against the debt. The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor, to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied, with the other assets, in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view it will be sufficient to refer again to the 133rd section, as to the satisfaction of the liabilities of the company *pari passu*. And the argument against the allowance of a set-off, addressed to the Court on behalf of the official liquidators, is extremely strong—that if a debt due from the company, to one of its members, should happen to be exactly equal to the call made upon him, he would, in this way, be paid 20s. in the pound upon his debt, while the other creditors might, perhaps, receive a small dividend, or even nothing at all.

The case of a member of a limited company is different from that of a member of a company of unlimited liability as to set-off. This is exemplified in the 101st section, where a set-off upon an independent contract is allowed to the member of an unlimited company against a call, although the creditors have not been paid —evidently because he is liable to contribute to any amount until all the liabilities of the company are satisfied, and therefore it signifies nothing to the creditors whether a set-off is allowed or not. But with respect to a member of a company with limited liability, if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the fund applicable to the payment of their debts.

But if the amount of an unpaid call cannot be satisfied by a set-off of an equivalent portion of a debt due to the member of a company upon whom it is made, it necessarily follows, in the last place, that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company. The dividend will be of course upon the whole debt, and the member of the company will, from time to time, when dividends are declared, receive them in like manner when either no call has been made, or, having

been made, when he has paid the amount of it. I am, therefore, of opinion that the orders of Vice-Chancellor Kindersley are right, though not exactly upon the grounds on which his Honour has been represented to have proceeded. I think the present motions must be dismissed; but, considering the general interest in the question, and the importance of having an authoritative decision upon it, the costs of all parties ought to be paid by the liquidators out of the estate.

Lord Justice Turner and Lord Justice Knight Bruce agreed.

Winding-up Cases. Set-off of Debt.

In re HIRAM MAXIM LAMP CO.

1902, 72 L. J. Ch. 18.

THE CHANCERY DIVISION.

In June, 1901, the Hiram Maxim Lamp Co. was incorporated under the Companies Acts, 1862 to 1900, as a company limited by shares, primarily for the purpose of selling electric lamps to be manufactured by the Sir Hiram Maxim Electrical and Engineering Co., Limited, on the footing of certain terms contained in an agreement dated April 26, 1901.

The Sir Hiram Maxim Electrical and Engineering Co., Limited, became holders of 5,000 £1 shares in the Hiram Maxim Lamp Co., Limited.

On January 10th, 1902, a call of five shillings per share was made on the shares, five shillings per share having been previously called up and paid. The call became due on February 6.

On March 10, the call not having been paid, the Hiram Maxim Lamp Co., Limited, commenced an action by specially indorsed writ in the King's Bench Division for the sum of £1,260 19s. 2d., being £1,250, the amount of the call, and £10 19s. 2d. interest.

The Sir Hiram Maxim Electrical and Engineering Co., Limited, claimed that a sum of £1,136 4s. was due to them from the Hiram Maxim Lamp Co., Limited, for lamps supplied; and on July 4th, upon affidavits setting out that fact, obtained an order giving them

unconditional leave to defend the action, and directing them to pay the sum of £124 15s. 2d., being the difference between the respective claims, into Court. On July 8th the £124 15s. 2d. was paid into Court, and subsequently a defence was delivered claiming set-off as to the balance of the claim, and counter-claiming for damages for breach of the agreement of April 26th, 1901.

On July 11th, 1902, the Hiram Maxim Lamp Co., Limited, passed a resolution for a voluntary winding-up, and a liquidator was appointed.

On July 22nd the liquidator took out an originating summons asking for an order that the Sir Hiram Maxim Electrical and Engineering Co., Limited, should within seven days after service pay to the liquidator the sum of £1,250 due upon the call.

Byrne, J. (after stating the facts) :—As from the moment of the commencement of the voluntary winding-up new rights intervened, and the liquidator now comes to the Court in his capacity as liquidator and asks for an order for payment of the call, which the company had sued for, but had not recovered judgment for before the winding-up commenced. It is conceded that, if there had been no action and no plea of set-off, there could be no right of set-off, in view of the authorities which determine that there can be no set-off as against the claim of a liquidator for the amount of calls due. The reasons of these decisions are pointed out in the passages which have been read in the course of the argument, and which I will not repeat, from *In re Overend, Gurney & Co., Grissell's Case* (1), and *Black & Co.'s Case* (2). But it is said, inasmuch as before the winding-up commenced a defence of set-off was raised and the set-off insisted upon by affidavit, that in point of fact, subject only to proof of the cross-debts, the original debts were gone, or the balance, if any, only remained. I cannot accept that view. The plea of set-off is, in truth, a plea proper, and is a claim to set-off the existence of a debt which by virtue of statute, or of rules pursuant to statute, the defendant is entitled to set-off against his indebtedness to the plaintiff. But those debts remain, in my opinion, two separate debts until judgment; and, where there has never been judgment, there seems no reason why the ordinary rule shall not prevail, and why the liquidator is not to recover, in his capacity of liquidator and for the purposes of the liquidation, that sum in respect of calls, without allowing for set-off, which has been sued for, but, it is true, not recovered by judgment before the winding-up commenced.

(1) [1866] 35 L. J. Ch. 572; L. R. 1 Ch. 528.
(2) [1872] 42 L. J. Ch. 404; L. R. 8 Ch. 254.

Directors' Act in Delaying Call to Permit of Transfer.

In re THE NATIONAL PROVINCIAL MARINE INSURANCE COMPANY, GILBERT'S CASE.

1870, 39 L. J. Ch. 837.

GIFFARD, L.J.

This was an appeal by Mr. George Gilbert from an order of the Master of the Rolls, whereby his Lordship refused to reduce the number of shares for which Gilbert had been made a contributory of the National Provincial Marine Insurance Company from 245 to 120.

On the 18th of April, 1867, Gilbert, who was a director of the company and the holder of 245 shares in it, executed a transfer of 125 shares to Edward Hardy at the price of one shilling per share. The transfer was passed and registered by the directors on the 20th of April. Hardy was at that time a clerk in the employment of the firm of which Gilbert was a member at the annual salary of £250, and with certain sums for commission. Gilbert, before selling him the shares, had promised him that in the case of a call being made, he would himself lend him the money to meet it.

It was proved on the evidence that in the previous March the directors were aware that, if the company were to go on, it would be necessary to make a call, and the question as to the amount of the call and when it should be made, was discussed at meetings of the directors held on the 16th and 17th of April, at which meetings Gilbert was present.

A Mr. Downse, a director of the company, in an affidavit filed on the winding up, said: "I was present at a special meeting of the directors, held on the 16th of April, 1867, when Mr. Hodges, the secretary of the company, explained that he heard that some shareholders in Newcastle-on-Tyne intended to transfer their shares to men of no means in order to escape further liability in respect of their shares, and he suggested that an immediate call should be made in order to frustrate this attempt, but all the directors did not then attend, and as this was an important step the resolution for making a call was not formally passed, and the directors agreed to postpone the actual making of the call until the following day, namely, Wednesday the 17th of April, which was the usual board day." And Mr. Hodges, the secretary, in his affidavit, said, that he

was present at a meeting of the board on Wednesday, the 17th of April, that a Mr. Heald attended on behalf of certain Newcastle shareholders, and that after some discussion it was agreed that a calls of £1 10s. per share should be made, but that at the request of Mr. Heald, who said he wished to confer with the shareholders at Newcastle, the formal resolution was not passed.

On the 23rd of April the call was made, and on the same day the directors refused to register several transfers of shares executed by the Newcastle shareholders on the 20th of April for the purpose of escaping liability. A motion to compel the company to register these transfers was refused by the Court, see *Ex parte Parker* (1),

On the 7th of March, 1868, the company was ordered to be wound up, and Hardy the transferee being insolvent, Gilbert was put on the list of contributories for the whole of the 245 shares.

By the articles of association of the company it was provided that shares might be transferred by deed, executed by the transferor and transferee; that the transferor should remain the holder till the name of the transferee was entered on the register; and that on the transfer being executed and presented to the company, along with such evidence of the title of the transferor, and of the execution of the transfer by him as the board might require, the company should register the transferee as a member.

It was also provided that the board might decline to register the transfer of any share made by a member indebted to the company; and that no transfer, unless with the previous consent of the board, should be made or registered after a call on such shares had been made, until the amount of such call, together with the amount of all overdue calls, if any, upon all other shares of the transferor, and the amount of interest, if any, in respect of such overdue calls, should have been first paid to the company, and that, notwithstanding the time appointed for payment of the calls had not arrived; but the last-mentioned provision was not to apply to any transfer which might have been actually lodged at the office previously to the call being made.

Mr. Swanston appeared for Gilbert.

Lord Justice Giffard:—I can quite accede to a part of Mr. Swanston's argument in this case. First of all, according to *Weston's Case* (2), and according to what I have always considered to be the law, there is no inherent power in directors, apart from the

(1) Law Rep. 2 Ch. 685.
(2) Law. Rep. 4 Chanc. 20; S. C. 38 Law. J. Rep.; N. S. Chanc. 49.

provisions of the articles of association, to refuse to register a proper and valid transfer of shares, if that valid and proper transfer is submitted to them. In the second place, I quite agree that because a man is a director he is not necessarily a trustee of the shares he holds for the general body of shareholders; and in a vast variety of circumstances he is just as free to deal with his shares—except perhaps his qualification shares, which of course he could not deal with without giving up his directorship—as any other person.

But these two propositions do not cover this case. What I have to consider in this case is this. Here were directors who had what was unquestionably a discretion to exercise with regard to a fiduciary power, and that fiduciary power was this—that they at a particular time, on the 17th of April, 1867, had to say aye or no, ought or ought not a call to be made; and if at that time they had exercised that discretion, by saying that a call should be made, then beyond all question these shares would not have been transferred, as they have been transferred, to Edward Hardy.

With these observations, I will first of all go to the facts of this case. There can be no doubt that Gilbert had been talking to, and probably negotiating with, Hardy some time before the 17th of April. Hardy was a clerk in the service of his firm at a salary of £250 a year, and he was allowed to get a commission by transacting some business on his own account: but I am satisfied that he could not pay at that time, and I am satisfied that Gilbert knew he could not pay anything like the sum which was likely to be called for on these 125 shares, because Gilbert himself says that he promised Hardy to lend him the money that was requisite for the purpose of enabling him to pay the calls. In that state of things, there was a meeting of the directors on the 17th of April, and at that time I have no doubt that Gilbert was desirous of getting rid of his liability on some of his shares. That being so, I will just refer to the evidence of what occurred at the meeting of the board held on that and the previous day. [His Lordship read the evidence of Mr. Downse and Mr. Hodges set out above, and continued.] I should further observe that there is evidence that in March it was suggested that a call would be necessary if the company were to go on at all. Further, Mr. Gilbert himself ventured not to swear that it had not been proposed to make a call for the purpose of preventing these transfers by the Newcastle shareholders. What took place on the 20th and 23rd of April I do not think it material to deal with, for what took place on the 17th is really the key to the transaction. If there had been no proposition, if there had been no suggestion of a call prior to the 20th of April, when the

transfer to Hardy was sent in, possibly the case might have stood in a very different position. But what we have to see is, what was the state of things on the 17th, and what was Gilbert's duty on that day. It is plain to my mind that any directors who were disinterested on the subject, who could exercise their discretion without bias, knowing as they knew what was about to be done with reference to the Newcastle shareholders, knowing that a call was necessary, knowing that within a few days, at any rate, a call must be made, would, on that 17th of April, if they had had any regard to the due interests of their shareholders and the company, have made the call on that day, as it was their plain duty to have made it. Then what do I find? I can find but one reason why they did not make the call on that day; and that reason is, that their duty would have induced them to go one way, and their interests to one totally in an opposite direction; but if you find persons who have to exercise a fiduciary power, and have a discretion with regard to that fiduciary power, choosing to place themselves where their interests pull one way, while their duty is manifestly and plainly to do some other thing which is contrary to that interest, and then abstaining from exercising that power, they must be held to all the same consequences as though that power had been exercised. That being so, as a matter of course, it follows in this case that the appellant must be held liable in respect of these 125 shares, because, according to the terms of the articles, unless the transfer is left before the call is made, the directors are not bound to register the transfer. This transfer was not left until the 20th of April, and I hold that on the 17th, Gilbert ought to have done his best to have had the call made. I hold also, that on the 17th all the other directors ought to have done their best to have the call made; and the conclusion I draw from the evidence is that they did not do so because they were minded at that time before the call was made to get rid of their shares, so as to escape liability. That being so, the transfer is bad and void, and the result is that the application must be dismissed with costs.

Transfer by Director to Escape Liability under Imminent Call.

IN RE CAWLEY & COMPANY.

L. R. 42, Ch. D. 209.

THE COURT OF APPEAL.

On the 16th of April, 1886, Cawley & Co., Limited, a company formed for the purpose of taking over certain fuller's-earth works at Nutfield, Surrey, was registered with a nominal capital of £60,000 in shares of £1 each, which the memorandum authorized to be divided into classes.

The articles of association contained the following provisions:—

Article 23. That the company should have a first lien upon all the shares of any member, "for all moneys owing to the company from him, alone or jointly with any other person, whether due or not.".

Article 24. That such lien might be made available by a sale of such shares, providing that no such sale should be made except under a resolution of the board, and until such notice in writing should have been given to the indebted member or other holder of the shares.

Article 26. That transfers of shares "shall not be complete until the same shall have been duly entered in the register of transfers."

Article 27. "No person being indebted to the company, either in respect of calls or otherwise, shall, without the consent of the board—which consent they may give or withhold at their discretion—become or be registered as a member in respect of any share the amount of which shall not have been fully paid up, or transfer any share."

Article 28. That the register of transfers should be kept by the secretary under the control of the board.

Article 32. "A person shall not be registered as the transferee of a share until the instrument of transfer, duly executed and stamped, has been left with the secretary to be kept with the records of the company, but to be produced at every reasonable request; but in any case in which, in the judgment of the board, this article ought not to be insisted on, it may be dispensed with."

Article 38. "The amount payable on the shares in the capital shall be payable at the bankers of the company, or at such other place as the board shall appoint, with such deposit and in such instalments and manner, and at such time, as shall be appointed from time to time by the board."

Article 42. "All calls in respect of shares shall be deemed to be made at the time when the resolutions authorizing them are passed by the board."

Article 44. "The board may, by any subsequent resolution appoint a new time and place for payment of a call as regards such persons as have not paid the same."

Article 45. "Whenever any call in respect of shares is made otherwise than on allotment, twenty-one days' notice of the time and place originally, or by any subsequent resolution, appointed for the payment thereof, shall, either at the time or any time after the call is made, be given to every member liable to the payment thereof."

Article 46. That in case of non-payment within seven days after the appointed day, a second notice should be given requiring immediate payment, and in case of non-payment for seven days after such second notice, the company might (without prejudice to their rights to forfeit the shares) sue the defaulter for the amount unpaid, with interest.

Article 51. That if any instalment on a share remained unpaid for seven days after such notice, the board might declare the share forfeited.

Article 90. That the procedure at a board should be regulated as the directors present thought fit.

The issue of the company's share capital was divided into ordinary shares of £1 each and deferred shares of £1 each. On the ordinary shares 5s. per share had been paid up, and on the deferred shares 10s. per share. No dividend had yet been paid on the deferred shares.

In July, 1888, William Brown Hallett, who was the registered holder of 2,300 deferred shares, became a director of the company.

On the 15th of December, 1888, Hallett executed a transfer of 2,000 of his shares, on which no further call had then been made, to Solomon Jones, who was a clerk to his, Hallett's, solicitors, in consideration of £80. Hallett deposed that this was the full value of the shares, that the transfer was by way of absolute sale, and that he himself retained no interest whatever in the shares. The transfer was duly executed by Jones as well as by Hallett, and on or before the morning of the 18th of December, 1888, Jones sent or took it to the secretary of the company for registration.

Prior to the execution of the transfer, it was seen that a call must be made.

At a meeting of directors, held 18th December, 1888, the first business listed was consideration of transfers, but the Board declined to consider Hallett's transfer till the business of the call should be disposed of.

The call was then pretended to be made, but time and place of payment left blank in the resolution.

The directors then refused to authorize the registration of the transfer.

On 17th January, 1889, a resolution was passed which applied time and place of payment of the call. The further facts appear in the judgment quoted.

Chitty, J., refused an application by Hallett for an order compelling registration of the transfer.

Hallett appealed to the Court of Appeal.

Lord Esher, M.R.:—This was an application made under sec. 35 of the Companies Act, 1862, to obtain a declaration from the

Court that the company ought to have registered a transfer of certain shares, 2,000 in number, that belonged to the applicant, Mr. Hallett. The learned Judge has declined to make the declaration. The facts of the case appear to be these. The company is a company formed under a memorandum and articles of association. Mr. Hallett was the holder of shares to a larger number of shares than the 2,000 he transferred. He also was a director of the company. On the 15th of December, 1888, the company was indebted to its bankers, and, as it appears to me, was not in a prosperous state. The bankers were pressing for the money which was due to them, and on the 15th of December, I think, Mr. Hallett, he being a shareholder and also a director, did know that the company was not in a prosperous state, and did know that within a very short time, not that any time was then fixed, but that within a very short time in all probability a call would have to be made; and on the same 15th of December, he transferred 2,000 of his shares to a solicitor's clerk—I believe it was the clerk of his own solicitor—for £80; and I should draw the inference myself that Mr. Hallett did so transfer these shares in order to avoid the prospective call which he saw would very soon come; but it is not suggested that he was making a nominal transfer to the clerk with the intention of keeping the shares in his own power or under his own control. It was, then, a real transfer made with the motive I have stated. The transfer having been perfected, so far as it could be perfected, by the execution of the proper document, it seems to have been sent for registration under article 26 of the articles of association, and to have been sent to the proper person appointed by article 32 for that purpose, namely, the secretary of the company. I am clearly of opinion that, by the articles of association of this company, unless there was something else in the case, there was no discretion in the directors to decline to register the transfer. They were bound to register it. The registration would be a purely ministerial act; but if the transferor was indebted to the company, either by calls or otherwise, then, according to the articles, the registration could not take place without the consent of the board; that is to say, in that case they would have a discretion. The transfer seems to have been sent to the secretary some day before or on the morning of the 18th of December. In the afternoon of the 18th, there was a meeting of the board of directors. It did not seem to have been summoned for the specific purpose of making a call, but at that meeting, Mr. Hallett being present, the board did pass a resolution to call up the remainder of the capital of the company by successive calls of 5s. per share. But they inserted no day or time or place

when or where the calls were to become payable. Something happened with regard to that resolution which I cannot help thinking was most dangerously irregular; for the secretary, either in consequence of some supposed power vested in him, or of some idea of his own, some time afterwards inserted in the minutes of the meeting of the 18th certain dates as the dates of the calls. In my opinion, that was the most dangerous thing that could well be done. Minutes of board-meetings are kept in order that the shareholders of the company may know exactly what their directors have been doing, why it was done, and when it was done; and any shareholder, looking at these minutes as they now stand, would suppose the dates were agreed upon at the meeting and were then filled in, whereas, in truth, no dates were agreed on by the directors at all. The dates formed no part of the resolution, and yet here is the entry made as if they formed part of the resolution then passed. I trust I shall never again see or hear of the secretary of a company, whether under superior directions or otherwise, altering minutes of meetings, either by striking out anything or adding anything. The proper mode of fixing the dates would have been by resolution, and then entering that resolution on the minutes.

I have now stated what took place on the 18th of December. It seems to me that there was no direction from the directors which could authorize the secretary to do anything with respect to the dates at any time after the 18th of December until the 17th of January, 1889, when a resolution was passed having the effect of fixing the dates.

That being the state of the case, the directors, at the meeting of the 18th of December, 1888, declined to enter this transfer on the register; and the question is whether they were entitled so to do. It is admitted that, but for some alleged equity, they were not entitled to decline to enter the transfer on the register unless they had a discretion under the articles; and that by the articles they had no discretion to decline to register unless the transferor was indebted to the company. It was urged on behalf of the company that Mr. Hallett was in point of fact "indebted" to the company within the meaning of article 27—that from the time he became a shareholder he was indebted in respect of the unpaid portion of his shares; but if that were held to be indebtedness, such articles as are now before us would mislead any person who proposed to become a shareholder of the company. A person takes shares in a company, the articles of which say that there is to be no discretion in the directors to refuse to register any transfer he may make, unless he is indebted to the company. The argument is that from the moment he takes

shares, he is indebted for the amount of those shares; but then the clause which says that, in case of his being indebted, the directors are to have a discretion would be futile and misleading, because, if the contention is right, they would in point of fact have a discretion from the very first. That is not the meaning of the clause by itself. If, therefore, he was not indebted at the time when he had a right to ask the directors ministerially to register the shares, they had no discretion and were bound to do it.

Now, what is that time? It was argued that the time when the indebtedness is to be ascertained is the time when the question of registration is laid before the directors, and that, though a transfer in every respect valid has been sent to the secretary to be registered, that is not the time, but that the time is when the secretary lays it before the directors and they consider the matter. The answer is twofold; first, that the directors had nothing to consider, as the act to be done was purely ministerial; and, secondly, that, if the directors were permitted to choose when they would do that ministerial act, the registration would be at the mercy of the secretary or the directors whether they would do that ministerial act; and if, in consequence of the postponement of that act, a call were made first, then, although the transferor was not indebted at the date of the transfer and at the time of its being sent in to the secretary, he would have become indebted, and the directors would, either through their secretary's delay or through their own delay, acquire a discretionary power which they would not have possessed but for that delay. In my opinion, the time when the indebtedness of the transferor is to be ascertained is, not when the transfer is laid before the directors, but when, according to the articles of association, it is sent in for registration to the proper officer, in this case the secretary.

Then the question is whether Mr. Hallett was indebted at the time the transfer was sent in to the secretary for registration. Even if what took place on the 18th of December amounted to a call and made the shareholder on whom the call was made a debtor to the company, still, at the time when the transfer should have been registered, Mr. Hallett was not. That would be an end of the case had it not been for the equity which has been alleged, and which I will deal with presently.

But it has been strenuously argued that there was a good call on the 18th of December; and, as the question has been argued, I do not hesitate to express my opinion upon it. My opinion is, that there was no call whatever made on the 18th of December. In order to make a call within the articles of association, we must

see what is necessary to be done to make a call. In the first place, there must be a resolution of the directors. They cannot do such a thing as make a call without a resolution. Then, what is to be done in passing a resolution to make a call? Article 38 says the time and place for payment must be stated. [His Lordship read the article, and proceeded:—] Therefore, there could be no valid call in this company until the time and place for its payment had been appointed by the board; that is to say, until it had been resolved by the directors that the call should be payable in certain instalments and in a certain manner and at a certain time appointed by the board. The article says, "as shall be appointed from time to time." I take those words to mean this: that the directors are not bound to make a call of the whole of the unpaid capital, but that they may make a call of part only, and that at another time they may deal with the rest, so that there may be successive calls until the whole of the capital has been paid up. After making a call, as for instance, of 5s. per share, if a particular number of shareholders do not pay on the day appointed, the directors may, under art. 44, appoint another day, but only after they have made a valid appointment of a certain day in the first instance; and then, owing to circumstances that have arisen since, they may appoint a further day on which those who have been called on to pay on the first day, and have not paid, are to pay the call; and then under arts. 46 and 51, if they do not pay on that further day, the remedy of the directors is either by action or forfeiture. These provisions make the case stronger against the company, because they shew that there was no valid call made on the 18th of December, and that no time or place of payment was appointed until the 17th of January following.

But then it is said that the resolution of the 17th of January reverts back to the 18th of December: but, if there is a resolution passed that a call shall be made, and afterwards, on a subsequent day, a further resolution is passed naming a time and place for payment, the utmost that can be said is, that the two resolutions taken together make a valid call, but that there is no call until the latter day; that is to say, the first resolution must be carried down to the second. Therefore, if there was a valid call on the 17th of January, there was no valid call until the 17th of January; and, accordingly, there was no call which made Mr. Hallett a debtor to the company.

That being so, we now come to the equity. The equity was rather suggested than definitely stated by the learned counsel for the respondents, and the argument went to this: that there was an equity against Mr. Hallett that a director cannot transfer his shares

in order to avoid a prospective call, that is to say, a call which he knows, or ought to have known, will have to be, or will in a short time, be made. Now, a shareholder may do so: that is well settled. If Courts of Equity had taken a very strict view of the matter, it might have been held that it was not within the right of a director to transfer his shares to avoid a prospective liability to the company, but there is no such authority to be found. It might have been so held. I do not say it ought to be so held, but I will merely say that it has not been so held. The Courts have, in fact, come to a contrary conclusion; therefore, the company cannot rely on that contention.

Then, if that is not the equity, what equity is there? A case was cited in which a shareholder, who knew that a meeting was actually convened for a certain day in order to make a call, persuaded the directors to postpone making the call until a subsequent day, and the Court—which adopted the equity—drew an inference of fact, which was, that he persuaded them in such a manner as to let them understand that, if they did postpone making the call, he and others would not transfer their shares in the meantime. The Court, therefore, drew the inference that he made a representation to them that if they postponed making the call, he would not transfer his shares. They did postpone the making of the call, and he did transfer his shares. That raised the equity against him. There is nothing of that kind here. Mr. Hallett did not persuade the directors to postpone the meeting or to delay coming to the resolution which they did come to. They did nothing on the faith that he would not transfer his shares in the meantime. They, in fact, knew that he had already done so: therefore, he cannot come within that equity.

Then the next equity raised against Mr. Hallett, was this:—that where directors are required to make a call at a certain time, and postpone doing so until a subsequent time in order that between the original time and the postponed time they may get rid of their shares, they cannot, by so attempting to get rid of their shares, escape liability, since they are trustees of the power of making calls for the general body of shareholders and must not use that power for their own benefit. But that equity does not arise here. There was no meeting of directors summoned to make a call. Mr. Hallett did not decline to assent to any call being made in order that he might get rid of his shares. Nor did he ask any of his co-directors to postpone making a call for that purpose. He had in fact already got rid of his shares. In my opinion, neither of the equities that have been alleged can be raised against him. The only way of

asserting an equity against him is to say that he transferred his shares at a time when he knew the company was in difficulties and that a call might have to be made; but there is no such equity, and no such equity was urged before the learned Judge below. It seems to me that this equity was only put forward as a last resource. I can see no reason why the directors should not perform the ministerial act of registering the transfer. They ought to have done so, and, therefore, I cannot agree with the decision of the learned Judge, to whose mind the reasons why there was no call made on the 18th of December were not, as it seems to me, sufficiently brought.

COTTON, L.J., and FRY, L.J., expressed themselves to the same effect.

Forfeiture of Shares for Non-payment. Strict Procedure. Laches.

CLARKE AND CHAPMAN v. HART.

27 L. J. Ch. 615.

THE HOUSE OF LORDS.

In the course of his judgment it was held by the Lord Chancellor (LORD CRANWORTH):—

* * * For forfeitures were *strictissimi juris*, and those who sought to enforce them must exactly perform all that was necessary to give them validity. In this case it was admitted on all hands that the proper mode of enforcing a forfeiture was by convening a general meeting, upon full notice of the purpose of the meeting, after the period limited for the payment of the calls. There could be no doubt here that the calls had been duly made and that the respondent was in default, so that assuming the right to forfeit to be a legally existing right, a general meeting might have been convened and the shares declared forfeited. Had that been done?

* * * It might be doubtful whether such a meeting was ever held at all, but at all events it was clear that no such formalities were observed as would make it binding upon Hart.

The property was of a precarious decsription, the emergencies to which it was subject required an instant supply of capital and a faithful performance of obligations, and therefore Courts

of Equity had said that they would not afford encouragement to parties who lay by and watched the adventure with a view to determine their own conduct as they should find the adventure prosperous or not. With the exception of the case of *Prendergast* v. *Turton* (1) it would be found that all the cases in equity were those in which the parties had found it necessary to come to the Court for the peculiar relief which it afforded when they were not in possession of the interests which they claimed. *Senhouse* v. *Christian* (2), *Norway* v. *Rowe* (3) and *Clegg* v. *Edmondson* (4) were all cases of that class, and in all these cases a strong opinion was expressed, not that the parties had by laches disenabled themselves from applying to a Court of Equity for relief, but that their conduct amounted to an abandonment of their right. In *Prendergast* v. *Turton* (1) the Court proceeded, not upon the principle of any mere laches, but upon that of the party having abandoned his right, and that case appeared to be applicable to the state of things here, for there, as here, the shares remained vested in the party to whom they originally belonged. The distinction between the two cases was one of fact, namely, that notice of the forfeiture had there been given, and the party to be affected by it took no steps to assert his interest for a period of nine years, while here no such notice had been given. On the contrary, the letter of August, 1850, was quite sufficient to induce Hart to believe that his shares never had been forfeited, so that it was not necessary for him to do more than assert his right as he had done in the correspondence. Hart's own letter of November, 1851, was in truth a challenge to the other parties to do what they had intimated their intention of doing, but which he asserted to be an act beyond their lawful power. Upon the whole, he was clearly of opinion that, even if the appellants possessed the power to declare a forfeiture, they had never duly exercised it. Hart, therefore, remained in possession of his shares, and there was nothing in his conduct which amounted to a waiver or abandonment of his right.

The other learned Lords agreed.

NOTE.—*This principle as to laches was followed in Jones* v. *North Vancouver Land Co.*, L. R. 1910, A. C. 317.

(1) 13 Law. J. Rep., N. S. Chanc. 268.
(2) 19 Ves. 159.
(3) 19 Ves. 144.
(4) 26 Law. J. Rep., N. S. Chanc. 673.

Call. Forfeiture. Number of Directors Acting. Ultra Vires.

In re ALMA SPINNING COMPANY, BOTTOMLEY'S CASE.

1873, L. R. 16, Ch. D. 681.

JESSEL, M.R.

The Alma Spinning Company, Limited, was registered in 1876 under the Companies Acts, 1862 and 1867, with a capital of £15,000 in 3,000 shares of £5 each.

The company's articles of association contained the following provisions:—

The directors were empowered (article 4) to make calls upon the shareholders; and (article 6), in default of payment of calls by any shareholder after due notice, to declare his shares forfeited.

Article 35. "The business of the company shall be conducted by not less than five, nor more than seven, directors;" the holder of twenty or more shares being eligible as a director.

Article 43. "The office of director shall be vacated if he ceases to be the holder of twenty shares in the company, if he becomes bankrupt or insolvent * * *" and

Article 45. "The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business * * *"

Article 64 provided that no alteration in the articles should be made except at a special general meeting summoned for the purpose by a quarterly meeting, and after due notice of the proposed alterations.

There were originally appointed by the articles six directors of the company, of whom James Bottomley, the holder of 250 shares, was one.

These directors fixed three of their number as a quorum.

In June, 1877, a call was made upon the shareholders, but Bottomley made default in payment of the amount of his call.

Some time prior to the month of October, 1877, one of the six directors died. It that month, there being then only five directors, including Bottomley, Bottomley presented a petition for liquidation by arrangement, and a trustee was appointed.

In November, 1877, at their quarterly general meeting, the company passed, or purported to pass, a resolution that the business of the company should be carried on by not less that three directors and not more than seven, and that article 35 should be altered accordingly by substituting the word "three" for "five."

It was admitted at the Bar that this resolution was invalid, as it was not passed in compliance with the requirements of article 64.

In December, 1877, the four then acting directors (exclusive of Bottomley) made a further call upon the shareholders, but neither Bottomley nor his trustee paid anything in respect of this call by the day appointed for payment, whereupon a notice was served upon them under the 6th article of association, requiring them to pay the two calls by a certain day on pain of forfeiture of the shares held by Bottomley.

Bottomley and his trustee having failed to comply with that notice, the four acting directors, in April, 1878, held a meeting, at which they passed a resolution declaring Bottomley's shares forfeited.

In December, 1878, the company passed resolutions for a voluntary winding-up, and appointed a liquidator.

In the course of the winding-up it turned out that there was a considerable surplus of assets, after satisfying all claims, available for division among the shareholders, whereupon Bottomley, whose liquidation proceedings had been closed, made a formal tender of the amount of his unpaid calls to the liquidator, and claimed the right to be restored to the register of shareholders and to participate in the distribution of these assets, contending that, having regard to the terms of the articles of association, the forfeiture of his shares by four directors only was *ultra vires* and invalid.

In order to have the question decided, the liquidator then took out this summons under sec. 138 of the Companies Act, 1862, for a declaration that Bottomley was not entitled to be registered or treated as the holder of the shares in question; that such shares were duly forfeited, and that the assets remaining in the hands of the liquidator might be dealt with on the footing of such shares having been duly forfeited.

JESSEL, M.R.:—The first question is whether the call was well made; and the second question is whether the forfeiture was well made. As regards one of the calls—the second—it is admitted that at that time there were only four acting directors, the office held by Mr. Bottomley having been vacated by his insolvency; for, as he had liquidated by arrangement and his property had vested in a trustee, there is no doubt of his having been insolvent. At the next quarterly meeting, a resolution was passed —which, it is admitted, was invalid—reducing the minimum number of directors to three, and under that invalid resolution the

four acted as the only directors of the company, and under that invalid resolution made a second call and declared the forfeiture.

I think a great many of the observations made in the case to which I have been referred, of the *Garden Gully United Quartz Mining Company* v. *McLister* (1), apply to this case. In the first place it was decided that there must be properly appointed directors to make a call or declare a forfeiture. In the next place, it was held that when directors take their nomination from a meeting which illegally elected a full board, although some of those directors had been legally appointed before, they could not say they continued in office under their former appointment and reject the irregular and invalid resolution of the meeting which made them a full board—that they must be held to have been elected under that resolution.

In the present case, it seems to me very difficult for the liquidator to say—admitting that the resolution reducing the number of directors was invalid—that those directors did not act under that resolution. They clearly did so, and acted as four directors only.

The next question is whether a call or a forfeiture declared by those four directors is valid. The words of the 35th article of association are these: "The business of the company shall be conducted by not less than five, nor more than seven, directors." Very simple words. If there were no interpretation of them, I should hold them as equivalent to saying, there shall never be less than five nor more than seven directors. The words no doubt are, "the business of the company shall be conducted"; but they are meant to point out what the number of directors of the company shall be—not merely by whom the business of the company shall be conducted. It was so decided in *Kirk* v. *Bell* (2), where the words were practically the same as we have here; and therefore, if I wanted a decision in point, there it is. The words there were—instead of "the business of the company shall be conducted by"—"the management of the affairs of the company shall be entrusted to" (which, of course, is the same thing) "not less than five, nor more than seven, directors;" and it was held that there must be at least five directors. I agree that that is the fair meaning of the clause.

Now comes the question, that being the proper meaning of the clause, is it to be treated as directory only, or as obligatory? If there were no decision I should have said on principle that it

(1) 1 App. Cas. 39. (2) 16 Q. B. 290.

could not be merely directory—it is a negative and an affirmative. The shareholders have entrusted the management of their business to a certain number of persons, not to any other number. They say, in effect, "there shall not be less than five, nor more than seven, who shall manage our business; less than five shall not be the managers." If, in an ordinary case, persons appointed seven people to be their attorneys, and said, "they shall conduct the business, not being less than five," would anybody say that if the attorneys were below five they could conduct the business? Is there any distinction between that case and this? Or take the case of a man going away and leaving his business to three clerks, and giving them power to act for him, and to draw bills, not less than two to act together—could any one of them draw bills? I do not see the distinction on principle. The contract of this partnership, or *quasi*-partnership, is that the business shall be managed by not less than a certain number of persons: what right has a Court of Justice to say that it shall be managed by a less number, without the shareholders being consulted? That is what it comes to, for it is admitted that the resolution reducing the number of directors was not binding on the company. It appears to me, irrespective of authority, that the principle is clear.

Then the argument of inconvenience is adduced. Now I have always said, and I am repeating, I am afraid, what I have been compelled to repeat over and over again, that the argument of inconvenience is a very strong argument where the construction of a document is ambiguous—where it is fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences of that construction which will cause inconvenience and were probably not contemplated by the framers of the documents. It is said that if there were five directors only, and one died suddenly before a quarterly meeting, there might be an interval during which the business of the company could not be conducted. The answer is, the company should have started with seven, the full number; then it would not have been very likely that the number would be reduced to less than five in the intervals between the quarterly meetings. Or they could have called a special meeting, and so provided for the continuance of the business.

I will now proceed to consider two cases, by both of which I should be bound, because they are decisions of the Court of Common Pleas and the Court of Queen's Bench respectively, and

have been decided long ago. If they were inconsistent, then the second decision, *Kirk* v. *Bell* (2), which was in 1851, would of course be binding on me as distinguished from the first decision, *Thames-Haven Dock and Railway Company* v. *Rose* (3), which was in 1842; but I do not think they are inconsistent.

The question in the *Thames-Haven Dock and Railway Company* v. *Rose* was one of construction. As I read the decision, two of the Judges held the words there to be directory—great Judges they were, Chief Justice Tindal and Mr. Justice Maule; but at the same time the decision of the Chief Justice did not turn on that. It turned on this, that if there were any grounds to dispute the debt they should have been pleaded. There was a good debt admitted, and it was too late, after judgment, for the defendant to take advantage of it. But the Chief Justice did say in the middle of his judgment, that he thought it was a matter of direction only. Mr. Justice Maule says: "The question depends upon secs. 109, 110, 111, and 112,"—which he read; and then he says, "It appears to me that the provision referred to is a mere arrangement as to the internal affairs of the company, and that it does not apply to their external affairs, or prevent them from enforcing calls that have been duly made." But here the question is whether the call has been duly made. I will now go to the sections which were referred to by the Judges in that case, because it appears to me the case is quite distinguishable from this. The 108th section, on which it turned, said that "The business and concerns of the company shall be carried on under the management of twelve directors, to be chosen," and so on. It did not give the minimum and maximum as here, and it was equivalent, in my opinion, to saying that "the number of directors shall be twelve." But then sec. 109 went on to provide that nine individuals should be the first directors of the company until the first general meeting, shewing that the business might be carried on by nine and not by twelve. The next section, the 110th, provided that "Any director who shall, by ballot or rotation, go out of office, may be immediately or at any future time re-elected." The 111th section said that no person holding any office under the company, or being concerned or interested in any contract, should be capable of being a director, or should act—that he should vacate his office and be disqualified. Then there was a clause that until his disqualification was communicated, his acts should be binding. Section 112 was that when any director should die, or resign, or become disqualified, and so forth, or should cease to be a director by

(3) 4 Man. & G. 552, 560.

any other means than going out of office, it should be lawful for the remaining directors to elect some other proprietor, and every such proprietor should continue in office so long only as the person in whose stead he was elected would have been entitled to continue in office had he lived and remained in office. Then the 116th section said that the directors for the time being should meet, and that they should not be competent to determine on any business unless at least five directors should be present. Now all these sections shewed this, that it was meant that the number of directors was to be twelve; not, however, that no business was to be transacted unless there were twelve, but it meant that no business was to be transacted unless there were five present; and that shews the distinction between having a minimum and a maximum, and simply stating the number. When the mere number of directors is stated, and then there are provisions shewing that the directors are to meet during vacancies to fill up the number, and that they may transact business with a less number, and so on, it is obviously meant that the larger number shall be the number of directors as the normal number, but not that business shall not be carried on with a less number. But that has no application when you find a clause that the number shall never be less than a certain number.

The present question does not arise very often in the case of companies, but it has arisen very often in the old Court of Chancery as regards charity trustees. In a great number of cases the point has been decided that where the foundation deed says the number of trustees shall be so and so, it does not prevent their acting with a reduced number; but when it says that, when the number comes to be reduced to a certain number, they shall fill up vacancies, they are compelled to fill up that number when the number becomes reduced; or if it says they shall only act not being less than a certain number, it is considered to be of the essence that not less than that number shall act. The same observation applies to a quorum. When you say "the quorum of directors shall be three," what does that mean? Stated in full, it amounts to this, that "no business shall be transacted unless there shall be three directors present." That is the meaning of a quorum. If it is said that is directory only, the answer is, it is not: it is of the very essence of the authority that there shall not be less. It appears to me that *Kirk* v. *Bell* (2) is a distinct authority in favour of this; and to shew how distinct it is, although the ultimate decision turned on a clause in the company's deed as to ordinary

business, I will refer to what Lord Campbell says. There a particular deed was executed by four directors. As in this case, there had been five directors, and they were reduced to four. The deed having been executed by the four, it was said that it did not bind the company, and so the Court held. Lord Campbell said, "It lay on the plaintiff to prove that those who executed the deed had authority. It seems to me that he failed to shew this; for though it was executed by all the directors, they were only four in number. In the deed of the company we find this clause." His Lordship read it, and it was as follows: "That the management of the affairs of the company shall be intrusted to such a number of directors as the shareholders shall for the time being deem expedient, so that it be not less than five nor more than seven, and the number at present deemed expedient and hereby appointed is five." Then he says, "If this regulation stood alone, at least five directors would be required, and four were not sufficient." So that he did not decide the case solely on the second ground, that there was a provision for ordinary business, but on the first ground also, that if the regulation stood alone, four were not sufficient. Then Mr. Justice Patteson, proceeding upon the clause relating to ordinary business, says this is not ordinary business; and then Mr. Justice Coleridge says this: "We must look to the deed of settlement to see what authority is given; for the individuals who become shareholders do so under the agreement contained in that deed. Assuming, what I do not say, that three directors out of four might exercise the powers of a board meeting, those powers are only for the transaction of ordinary business. * * * But it is not clear that three out of four could transact ordinary business. It is analogous to many cases; a familiar one is the submission to three arbitrators, any two of whom may make the award; in which case an award made at a meeting of two is not good unless the third had power to attend and join if he pleased."

It is obvious from that very cautious judgment that Mr. Justice Coleridge thought that even ordinary business could not be transacted, nor was he frightened at that result. Then Mr. Justice Wightman says the same thing in rather plainer terms: "It seems to me that the interest of the shareholders has been too much lost sight of in the argument. The shareholders stipulate for, and are entitled to have, the supervision of at least five directors."

In the present case the shareholders have entrusted the management of their affairs to a certain number of managing partners. and they have stipulated that there shall not be less than a

certain number. As I have said before, on principle I think that must be the conclusion; but still I am very glad to find that the last authority is tolerably clear to the same effect.

I therefore decide that these four directors neither had the power to make the second call nor to enforce the forfeiture; consequently the forfeiture is void. Mr. Bottomley is accordingly entitled to participate with the other shareholders in the distribution of the surplus assets, subject, however, to the payment of his calls to the liquidator.

Forfeitures. Calls Unpaid. Liability for Interest thereon.

IN RE THE BLAKELY ORDNANCE COMPANY, STOCKEN'S CASE.

1868, 37 L. J. Ch. 230.

CAIRNS, L.J.

Appeal from the Master of the Rolls.

The question was whether Stocken was liable to pay interest on a call for non-payment of which call his shares had been forfeited from the time appointed for payment till actual payment.

Clause 50 of the articles was as follows:—

"The forfeiture of any share shall involve the extinction, at the time of the forfeiture, of all interest in and all claims and demands against the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall, notwithstanding, be liable to pay the company all calls owing on such shares at the time of such forfeiture."

The original notice of the call given to Stocken stated that interest at the rate of £25 per cent. was payable under the articles of association. After the forfeiture, no new notice claiming interest was served upon him.

LORD JUSTICE CAIRNS:—I think that, whether the 50th clause of the articles of association is a penal clause or no, still a strict construction must be put upon it. It is proper to consider the circumstances under which a high rate of interest was imposed.

This was a trading company, in which the profits might be very large; therefore, unless a high rate of interest were charged upon calls, a shareholder might well think it worth while to take the profits and not pay his calls, but pay the interest upon them.

But whether or not that be the true reason, the true construction of the clause seems to me to be this. By the first part of it, all rights incident to shares are extinguished, and this must, I think, extend not only to rights against the company, but also rights in favour of the company and against the shareholder; and I am disposed to think that even without that part of the clause, all such rights are extinguished by the forfeiture, so that any proceedings at law against the shareholder would be stopped, because such proceedings must be grounded upon the fact of the defendant's being a member of the company, and I do not see how a claim for calls could be supported after a person ceased to be a member. And, indeed, this seems to have been the opinion of the framer of this clause, because he thought it necessary to reserve the right to the call, which is done by the latter part of the clause. This seems to me in substance and in law to be the creation of a new right. The member whose shares have been forfeited is to remain "liable to pay the company all calls owing on such shares at the time of forfeiture." We have there the full measure of his liability, and we find no mention of interest. Where there was an intention that interest should be paid, it is carefully mentioned and provided for, as in the 44th and 45th clauses. The clause in question stops short; it does not say all calls and interest owing, but simply "all calls." This is a new right commencing at the forfeiture, and limited by the terms of it to the precise sum which is the amount of the call.

I thought at first that the Act 3 & 4 Will 4, ch. 42, might have some bearing upon this case, but, upon consideration, it has not.

The sum is payable, it is true, under a written instrument, the articles of association, but that instrument does not specify any time for payment. There must, therefore, in order to come within the meaning of the Act, have been a demand for interest subsequent to the forfeiture. No such demand was, however, made, and, therefore, the act does not apply.

The appeal, therefore, must be dismissed, with costs.

Collusive Forfeiture of Shares.

COMMON v. McARTHUR.

1898, 29 S. C. R. 239.

THE SUPREME COURT OF CANADA.

There was a resolution forfeiting McArthur's stock in a company, and it was found that this was not a forfeiture in good faith, but a proceeding to release McArthur from his liability on the stock.

In the course of the judgment of the Court, it was said by

SEDGEWICK, J.:— * * * It is immaterial whether the transaction in question be considered as a surrender or a forfeiture, inasmuch as neither the one nor the other would have the effect of releasing him from his liability. It is elementary law that a shareholder cannot, without statutory authority, surrender his shares to a company and thereby get rid of his liability as a shareholder. It is *ultra vires* of a company to so traffic in its own stock, unless its instrument of incorporation gives it the power, and it is not pretended that any such power existed here.

The only question is as to the effect of the alleged forfeiture. It is, I think, quite clear that there was in fact no forfeiture in the present case. The resolution was a collusive one, passed, not for the benefit of the company or its creditors, not for the purpose of enabling the directors to realise upon the forfeited stock, but for the purpose of conferring a benefit upon their friend McArthur. It was in fact the same as if the directors had taken from the treasury of the company the four thousand five hundred dollars due and had made a present of it to him.

The power of forfeiture given by the statute to the directors is given, not to be exercised for the benefit of the shareholders, but for the benefit of the company and its creditors. If a resolution like the one here had the effect of releasing McArthur from liability, similar resolutions might have been passed releasing all the other shareholders from liability, thereby destroying the capital of the company and absolutely defeating the claims of creditors. To contend for the legality of transactions that might lead to such consequences is, in my view, absurd.

Reference need only be made to the leading case of *Spackman* v. *Evans* (1), where it was held in effect that the power of forfeiture for non-payment of calls is a power that is intended to be exercised only when the circumstances of the shareholder render its exercise expedient in the interests of the company. It is not a power to be exercised for the benefit of the shareholder. The duty of the directors when a call is made is to compel every shareholder to pay to the company the amount due from him in respect of that call, and it is only when payment cannot be obtained that the power of forfeiture is to be resorted to. The power must be exercised *bona fide* for the good of the company, not to relieve a shareholder from liability.

Surrender of Shares.

BELLERBY v. ROWLAND AND MARWOOD'S STEAMSHIP COMPANY.

1902, 71 L. J. Ch. 541.

THE COURT OF APPEAL.

The main point involved and the decision are sufficiently indicated by the following extracts from the judgment of Collins, M.R.:—

* * * I can see no distinction in principle between returning to a shareholder a part of the paid-up capital in exchange for his shares and wiping out his liability for the uncalled-up sum payable thereon. Both methods involve a reduction of the capital which, as Lord Watson points out in *Trevor* v. *Whitworth* (1a), persons dealing with the company are entitled to rely upon as existing either as paid-up or as still to be called-up, and such a reduction, therefore, can only hold good if sanctioned under the conditions prescribed. If it be objected that the shares may, in the language of Lord Watson, be 'reissued' and that, though the liability of the surrenderor to pay the amount still at call is extinguished, the liability will remain good against anyone to whom the company disposes of the share, the answer in this case is the same as that suggested by Lord Watson in the case where the money paid-up on the share is returned to the shareholder. He

(1) L. R. 3 H. L. 171. (1a) 57 L. J. Ch. 28; 12 App. Cas. 409.

says: 'In the event of the company continuing to hold the shares (as in the present case) "the amount paid up" is permanently withdrawn from its trading capital.' But further, and apart from the question of sale or trafficking in a company's own shares, I think the reasoning in *Ooregum Gold Mining Co. of India* v. *Roper* (2) establishes that to release a shareholder from any part of his obligation to pay the uncalled-up balance on his share is an *ultra vires* act on the part of the company.

* * * The justification of forfeiture rests upon the statute itself; and I think that since *Trevor* v. *Whitworth* no authority can be relied on as justifying a surrender having the effect of reducing capital which cannot be supported as a form of forfeiture.

Surrender of Shares. Capacity of Company to Accept Surrender and Re-issue.

R. SID SMITH v. THE GOWGANDA MINES, LIMITED.

1911, 44 S. C. R. 621.

THE SUPREME COURT OF CANADA.

Appeal from a decision of the Court of Appeal for Ontario affirming the judgment of the trial Judge in favour of the plaintiffs.

THE CHIEF JUSTICE (SIR CHARLES FITZPATRICK):—This is an action for calls upon stock of the respondent company for which it is alleged the appellant subscribed. It is admitted that the appellant signed a certain subscription agreement but he denies that the shares for which he agreed to subscribe were ever allotted to him. The action was maintained by the trial Judge and his judgment confirmed on appeal. Other defences were set up; but the sole question to be considered in this appeal is: Was the appellant ever a shareholder of the respondent, liable to pay the calls for which this action is brought? The inquiry is, on the evidence did the company ever do that which it was entitled to do, if it was really meant to make the appellant a shareholder? It is important to bear in mind that the action is not for breach of an agreement to take stock, but for moneys

(2) 61 L. J. Ch. 337; [1892] A. C. 125.

due by the appellant for calls made in respect of shares of the respondent company. The claim, therefore, is based on the assumption that the appellant is the holder of certain shares of that company and is in arrears for calls made on those shares. The appellant could become shareholder in one of two ways:

1st. By the allotment of shares from the company through the board of directors.

2nd. By a transfer of shares to him by a shareholder.

There can be no doubt that at the time of his subscription, as found by the trial Judge, all the shares were allotted to other subscribers and that there was no stock at that time which the directors could allot to the appellant under the subscription agreement. The judgments below, however, proceed on the ground that appellant's subscriptions were taken in lieu of subscriptions of former subscribers to whom allotments were made but who were allowed to withdraw and whose stock as allotted or re-allotted to the appellant.

To maintain those judgments on the facts of this case it would be necessary to hold that a shareholder to whom stock has been allotted may be relieved of his obligations by the consent of the board of directors. Unless forfeited for non-payment of calls the directors have no control over shares that have been allotted. The title to those shares is fixed and the company cannot substitute any one for the allottee, and there is no pretence that there was a forfeiture here. Title of course can be acquired by transfer, if all the calls then due on the stock transferred have been paid; but here there were unpaid calls due by the original allottee and there is in addition no evidence that any transfer was executed to the appellant or that he ever heard of, or was asked to accept, any transfer.

I would allow this appeal with costs.

The Judges concurred.

Transferable Nature of Shares, Generally.

In re THE BAHIA AND SAN FRANCISCO RAILWAY COMPANY, LIMITED.

1868, 37 L. J. Q. B. 176.

THE COURT OF QUEEN'S BENCH.

Special case stated by consent for the opinion of the Court.

1. On the 8th of March, 1866, Miss Amelie Trittin was the registered holder of five shares in the Bahia and San Francisco Railway Company, Limited, hereinafter called the "company," and deposited the certificates of the shares with one Thomas Charles Oldham, a stockbroker, and requested him to keep the same and to receive the dividends payable thereon.

2. On or about the 17th of April, 1866, a transfer of the five shares to John Alfred Stocken and Samuel Goldner, purporting to be executed by Amelie Trittin, but which, for the purpose of this case, was admitted to have been a forgery, was left with the secretary of the company for registration, together with the certificates of the shares.

3. The secretary of the company, in the ordinary course of business, then sent by post to the last place of residence of Miss Trittin, a written notice that the deed of transfer had been so received by him; and after ten days, having received no answer from Amelie Trittin, then registered the deed of transfer and removed the name of Miss Trittin from, and placed the names of John Alfred Stocken and Samuel Goldner upon the register of shareholders, as holders of the five shares; and share certificates in respect of the shares were handed to them.

4. In May, 1866, the Rev. Richard Burton, through his broker, bought on the Stock Exchange four shares in the company, and Mrs. Mary Anne Goodburn, by her broker, bought one share.

5. About the same time John Alfred Stocken and Samuel Goldner sold five shares in the company to Arthur Bristowe, a stockbroker, and in pursuance of the above contracts transferred four of the shares comprised in the forged transfer to Mr. Burton, and the remaining one to Mrs. Goodburn.

6. It is admitted that Mr. Burton and Mrs. Goodburn entered into the contracts above mentioned *bona fide* and for value of the shares, without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and on or shortly after the 28th of May, 1866, they were duly registered by the company as the holders of the said shares; and share certificates in respect thereof were handed to them.

6*a*. In the above transactions everything was done by the company in accordance with the usual course of business, and there was nothing in the circumstances, as far as they were known to the company, to excite their suspicion or to induce them to depart from such usual course of business.

The questions for the opinion of the Court were: First, whether, as against the company, Mr. Burton and Mrs. Goodburn were entitled to the shares in the company or an equivalent number? Secondly, whether they were entitled to any, and what damages to be paid by the company under the above circumstances?

The Court was to make such order and give such judgment as they might think fit and had power to make and give. (1)

COCKBURN, C.J.:—I am of opinion that our judgment must be for the plaintiffs. I look upon this case, when the facts are rightly understood, as falling within the decisions of *Pickard* v. *Sears* (2), and *Freeman* v. *Cooke* (3). The company are bound to keep a register, and power is given to them to issue certificates shewing that the persons named therein are registered holders of the specified shares. The purpose of giving these certificates is manifest, that is to say, it is done for the purpose of giving to the holders of shares additional facilities of dealing with and transferring their shares, and to make them more negotiable in the market, and thus to add to their value. This, therefore, is done for the benefit of the public in general. It is a declaration to the world that the person to whom the certificate is given, and who is named therein, is a shareholder in the company, and thus to satisfy the persons who may enter into dealings with him. The certificate is given by the company with the intention of being acted on in the sale and transfer of shares. It is stated in the case that the plaintiffs did what was necessary to be done by them. They accepted transfers of the shares, and paid their money on

(1) After the forgery was discovered, an order had been made that Miss Trittin's name should be restored to the register of shareholders. This was done, and the result was that the plaintiffs lost the benefit of the shares which they had purchased.

(2) 6 Ad. & E. 469.

(3) 2 Exch. Rep. 654; s. c. 18 Law J. Rep. (N.S.), Exch. 114.

having the certificates of the shares handed to them. It turns out, however, that the whole thing is a mistake, and that the company ought never to have registered them at all, as the shares had been handed over upon a forged instrument. This brings the case within *Pickard* v. *Sears* (2), and *Freeman* v. *Cooke* (3), which lay down the principle that if you make a representation with a view that another person shall act upon it, and he does so act, you are estopped from denying that you made the representation. That principle is clearly applicable to the present case. The only question, then, which remains is, what is the redress which the plaintiffs are entitled to? In whatever form they might have to put it, an action is certainly maintainable, and the question is what damages they ought to recover. I apprehend that they are entitled to such damages as would put them in the same position in which they would have been if the shares had been good shares, and had been handed over as they ought to have been. If the company refused to place them upon the register, they would be entitled to the market value of the shares. If such shares are not to be had in the market, which is possible, although not likely, a jury, in giving their verdict in an action, would have to say what would be the reasonable compensation to which they would be entitled under the circumstances.

BLACKBURN, J.:—I am of the same opinion. When these joint-stock companies were formed it was a matter of great importance to them that they should have an easy mode of transferring their shares, and accordingly the legislature have passed the Joint-Stock Companies and the Companies' Clauses Acts. The companies are to keep registers of their capital, divided into numbered shares, with the particulars required by section 25 of the Companies' Act, 1862. —[His Lordship read the section.]—In order to keep up such a register it is necessary when shares are transferred that the company should alter the register, and enter the name of the person to whom they are transferred. They ought to make inquiries and to ascertain whether the transfers are valid: in point of fact, they do make inquiries, but they may be deceived, as has been the case in the present instance, in which they have received a transfer which was a forgery, and in consequence of which they gave certificates, in which Stocken and Goldner were represented as the holders, when in point of fact they were not so. The act further provides that they may give certificates, which are to be *prima facie* evidence of the title of the member to the share or shares therein specified. It is clear that the object intended was, that the company should be empowered to give certificates upon which

the public might act, and when the company issue such certificates they do make a statement that the person to whom they have issued them is a holder of certain shares therein specified. If they have been deceived and have not acted negligently, there would be no moral guilt in making the statement, but the statement would be untrue. But they have the means, which no one else has, of inquiring into the validity of the transfers, and the intention of the legislature was that, to facilitate the transfer of the shares, they should issue the certificates on which the public might act.—[His Lordship then went through the facts, and continued] —I think, therefore, that the company have made a statement upon which they intended that a person purchasing the shares should act, or at any rate knowing that he might act upon it. If the plaintiffs acted reasonably upon this statement and paid money for the shares, and got in return the transfers and the certificates, and then the fraud was discovered, I think that they are entitled to recover on the ground of estoppel, as mentioned by my Lord in referring to *Freeman* v. *Cooke* (3), and *Pickard* v. *Sears* (2). It follows, therefore, that the plaintiffs are entitled to recover the value of the shares.

Mellor, J., and Lush, J., to the same effect.

THE QUEEN v. LAMBOURN VALLEY RAILWAY CO.

1888, L. R. 22 Q. B. D. 463.

THE QUEEN'S BENCH DIVISION.

(*The main point of decision is one of practice, but the dictum of Pollock, B., as to transferable quality of shares is valuable.*)

Rule calling on the Lambourn Valley Railway Company to shew cause why a writ of mandamus should not issue directed to them commanding them forthwith to register a transfer of 495 shares of £10 each in the said company from Henry Hippisley to Walter Aubrey White.

It appeared from affidavits that the prosecutor became a director and holder of shares in the defendant company, which was incorporated by the Lambourn Valley Railway Act, 1883.

The period within which the railway was to be made was fixed by the Act at five years. The railway was not made, and a proposal by the company to apply to Parliament for a bill to extend the time for the construction of the line was opposed by the prosecutor. The bill was, however, presented and passed, and a contract was entered into for the construction of the line, whereupon the prosecutor, desiring to withdraw from the company and under legal advice, executed an absolute transfer of his shares, for a nominal consideration, to one White, a stockbroker's clerk, practically insolvent. The transfers were tendered to the secretary of the company for registration, but he refused to register them.

It was conceded by the prosecutor that the transfer was made to avoid liability, but he maintained that the transfer was *bona fide* and without any reservation of right or interest, and he and the transferee offered themselves in Court for cross-examination on their affidavits, but the defendant company declined to cross-examine them.

POLLOCK, B.:—This was an application on behalf of Mr. Hippisley for a prerogative writ of mandamus to issue to the defendants, requiring them to register the transfer of 495 shares in their company which had been transferred by him to one White, who was clerk to a stockbroker.

The motion was resisted upon the grounds: First, that the transfer of the shares in question was not a real transaction; and secondly, that the transferee was a person in insolvent circumstances. Lastly, it was contended that the granting of a writ of mandamus being discretionary, the Court ought not to grant the present application, there being other remedies open to him.

Our decision upon the last contention renders it unnecessary to state our opinion as to the first two questions; but I think it is right to say that as the matter now rests upon the affidavits, I have come to the conclusion that the transfer was real in the sense that it was intended to effect an out-and-out assignment to the transferee, and that there was no covert agreement or understanding to the contrary; but I think it equally clear that the transferee was a man who was practically insolvent, and that he would be quite unable to pay any calls which might hereafter be made in respect of the said shares.

Under these circumstances the transfer is one which ought to be upheld by the Court.

Counsel cited *Hyam's Case* (1), *Costello's Case* (2), *De Pass's Case* (3), and *King's Case,* (4); and although the individual opinion expressed by some of the learned Judges varies, these authorities in substance support the proposition that if the transfer be real, it will be upheld, although it be made to a mere pauper, and for the avowed purpose of relieving the transferor from any future liability.

The remainder of this judgment, as that of Manisty, J., deals with the question of remedy, the decision being that the prerogative writ should not be invoked where relief by action of mandamus was available.

Right to Transfer Shares where no Restriction or Equity Intervenes.

IN RE SMITH, KNIGHT & CO.; EX PARTE WESTON.

1868, 38 L. J. Ch. 49.

THE LORDS JUSTICES.

Appeal from a decision of the Master of the Rolls.

The question was whether the directors of the company had power to refuse to register a transfer which had been duly executed by Mr. Weston as transferor and Mr. Birnie as transferee. The ground alleged by the directors for their refusal was that they were unable to ascertain Mr. Birnie's address. It appeared that the company made inquiries at the address given, which was the place of business of a relation of Mr. Birnie, and found that he did not live there, but that he was employed there, though not permanently.

The articles of association contained a provision that the directors might refuse to transfer the shares of any shareholder unless the certificate of the shares was produced; and another provision, that persons becoming entitled to shares otherwise than by transfer might require the company to register the shares in the name of a nominee instead of themselves. Beyond these there was nothing to regulate the registry of transfers of shares.

(1) 1 De G. F. & J. 75.
(2) 2 De G. F. & J. 302.
(3) 4 De G. F. & J. 544.
(4) Law Rep. 6 Ch. 196.

The transfer in question was, with the certificate of the shares, left for registration on the 19th of June, 1866.

On the 19th of July, 1866, a petition to wind up the company was presented. This was ordered to stand over generally, in order that the company might pass resolutions for a voluntary winding-up. This was afterwards done, the resolution confirming a special resolution to wind up being passed on the 30th of November, 1866.

Afterwards an order to wind up under supervision was made upon the petition.

It appeared that previously to the month of June the company was in difficulties, but was allowed by its creditors to continue to carry on business under a species of inspection on their behalf.

Lord Justice Wood:— * * * We come next to the main part of the case. Were the directors justified in refusing to complete the transfer of the fifty shares to Mr. Birnie? What was the power, I will not say the duty, of the directors as to registering or not registering this transfer? It is said, at this very time the company were carrying on their business under a species of letter of license from their creditors, and that therefore they were in such a condition that they ought not, without great precaution as to the character of a proposed shareholder, to admit him upon the register.

The creditors in substance said, Do not admit in your register any one whose competency to pay calls is at all doubtful. But as they chose to give a letter of license, and not to take the measure which was open to them of winding-up the company, they must accept the position of the company as being exactly the same as if no such arrangement had been made; and we must consider the question exactly as if that circumstance were entirely out of the case. Had. then, the directors, as part of their ordinary powers, the right to inquire into the position of a proposed transferee of shares and make the registration of the transfer depend upon the result of their inquiries? I feel bound, with great regret, to come to an opposite conclusion to that of the Master of the Rolls with regard to the law on this. He seems to have thought that, not only they were competent, but that it was their duty to do this.—[His Lordship then referred to the judgment of the Master of the Rolls.]—I have always understood that the very working of these companies was this, that many persons entered into them because they were unlike ordinary partnerships, but partnerships from which they could retire at will by transferring

their shares. They could sell their shares in the market, and no person, either director, shareholder or creditor, had any right to object, unless, of course, it was otherwise provided by the regulations of the company; the only restriction upon their so freeing themselves from liability being that it must be a *bona fide* transaction, by which I mean an out-and-out disposal of property, they not retaining any interest in the shares disposed of. When it was desired (as was quite possible, if thought fit), to put a restraint upon this unlimited power of disposal there was always inserted in the articles of association a clause for that purpose. Many instances of this kind have been discussed in the Courts; one I think—*Shortridge* v. *Bosanquet* (1)—went to the House of Lords, and there the directors were bound to exercise a discretion. In the absence of such a discretion, however, I think it is plain the statute gives, in the first instance, an absolute power of disposing of shares. The very object of persons entering into these partnerships is to have transferable shares, and it has always been thought that this was the policy of the legislature in making special provisions for joint-stock companies.

The shares then are transferable by statute, and the articles only point out the mode in which they shall be transferred, and the limitation, if any, to which the transfer shall be subject before registration. It was argued that all the shareholders might have excluded any proposed transferee, and what all the shareholders might do the directors might do; but I think the shareholders have no such power unless something is provided by the deed. When we look at this deed we find two sections only which have any relation whatever to this subject.—[His Lordship then read the sections before mentioned.]—But those sections have nothing whatever to enable the directors to approve or disapprove of a transferee. The one gives them the power of asking for the certificate, equivalent to asking for proof of the identity of the transferor; the other enables executors to sell shares without themselves being put upon the registry, which perhaps otherwise might not be allowed. Nothing can be stronger, if anything be wanted, to shew that the directors have no such power as is now contended for.

It would, I think, be a serious thing if a restriction, not found in the articles, not in the statute, were to be implied by law, taking away that which to a great extent constitutes the value of these shares,—their being marketable, and passing from hand to

(1) His Lordship referred to *Bargate* v. *Shortridge*, 5 H. L. Cas. 297; s. c. 24 Law Rep. (N.S.) Ch. 457, affirming *Shortridge* v. *Bosanquet*, 16 Beav. 84; s. c. 22 Law J. Rep. (N.S.) Ch. 48.

hand. Moreover, I might remark that the duties of directors would become more onerous as duties of trustees for the company than any which usually are imposed upon them. I never heard of their making inquiries as to the address of a shareholder under ordinary circumstances.

We come now to the question whether there was any ground for refusing the transfer.—[His Lordship then commented on the fact, arriving at the conclusion that the transfer was *bona fide* made to Mr. Birnie, and concluded by saying]—Under all these circumstances, I think that Mr. Weston did all that was necessary to entitle him to get rid of the shares, that they were properly and regularly transferred to Mr. Birnie, and that Mr. Weston was consequently entitled to have his name removed from the register, as having parted with his shares.

Lord Justice Selwyn concurred.

Estoppel by Issue of Share Certificate.

THE BALKIS CONSOLIDATED COMPANY, LIMITED v. TOMPKINSON.

1893, A. C. 396.

THE HOUSE OF LORDS.

Appeal from an order of the Court of Appeal (1).

The following statement of the facts is taken from the judgment of

Lord Herschell, L.C.:—This action was brought by the respondents to recover damages in respect of the refusal by the appellant company (who were the defendants in the action) to register the purchasers from the respondents of some shares in the appellant company.

Pollock, B., who tried the action, gave judgment for the plaintiffs for £717 10s., and this judgment was affirmed by the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.).

(1) [1891] 2 Q. B. 614.

The respondents, who are stockbrokers, in December, 1888, advanced to one Powter the sum of £250 by way of loan, on the faith of and in exchange for a transfer of 1,000 shares in the appellant company, which Powter deposited with the respondents as security for such advances. The transfer was what is termed a certified transfer, that is to say, it bore upon its face, above the signature of the secretary of the company, these words: "Certificate lodged." There can be no doubt that the purpose of this certification is to give an assurance to the person taking the transfer that the transferer has deposited with the company a certificate shewing his right to transfer. The loan of £250 was paid off in January, 1889, and further loans were afterwards made from time to time on the faith and security of this certified transfer.

In May, 1889, the respondent Tomkinson, with the knowledge and sanction of Powter, inserted his own name (as representing his firm) in the transfer as transferee of the shares, and having executed the transfer lodged it at the office of the appellant company for registration.

On the 1st of July, 1889, the appellant company, on the application of the respondents, issued to them a certificate signed by two of the directors, countersigned by the secretary, and sealed with the seal of the company, certifying that the respondent Tomkinson was the proprietor of the 1,000 shares.

In August, 1889, the balance due from Powter to the respondents was £193 14*s.* 6*d.*, for which they held the 1,000 shares as security. Powter then instructed them to realize for the purpose of paying his debt. The respondents accordingly in that month sold the 1,000 shares to various purchasers for the sum of £426 17*s.* 6*d.*, and for the purpose of completing such sales the respondents lodged with the appellants the certificate which had been issued in respect of the shares, together with transfers in favour of the respective purchasers thereof in order that they might be certified. This was done, and the transfers, with the certification signed by the secretary of the appellant company upon them, were returned to the respondents and handed by them to the various purchasers, who thereupon paid their purchase-money. Out of the £426 17*s.* 6*d.* thus received by the respondents, they repaid themselves the balance of £193 14*s.* 6*d.*, which remained due as already mentioned, and, after paying to Powter a sum of £110, they retained the balance of £123 3*s.*, Powter, who shortly afterwards absconded, being indebted to them to an amount largely in excess of that sum.

The appellant company refused to recognize the certified transfers, or to register the purchasers named therein as the holders of the shares. The respondents were consequently compelled, in accordance with the custom and rules of the Stock Exchange, to complete their contracts with the purchasers by purchasing and delivering to them 1,000 other shares in the appellant company in the place of those named in the transfers. The market price of the shares having risen, the respondents were compelled to pay the sum of £717 10*s.* for such substituted shares, and it is the amount of this payment which they have been held entitled to recover.

From the evidence adduced at the trial, it appeared that in December, 1887, Powter was the registered proprietor of a large number of shares in the appellant company. In March, 1888, the company certified a transfer of 5,000 of these shares (of which the 1,000 which Powter purported to transfer to the respondents formed part) to Maitland and Balfour. A note of this was indorsed by the appellant company on the certificate of Powter's shares which was in their possession. In January, 1889, the company registered Balfour and Maitland as proprietors of the 5,000 shares and gave them the usual certificate. It was under these circumstances that they refused to recognize the respondent Tomkinson as proprietor and to register his transferees.

Lord Herschell, L.C. (after stating the facts given above), proceeded as follows:—

My Lords, it was contended for the respondents that the certificate which the respondent Tomkinson received from the appellant company was given to him for the purpose of being used by him as evidence of his title to the shares; that on the faith of this, he entered into contracts of sale which he was bound to fulfil; that the appellant company were under these circumstances estopped from denying that he was the proprietor of the shares, and that, having refused to register the purchasers and transferees from him on the ground that he was not the proprietor of them, they were liable to make good to him the loss he had sustained in consequence.

It was held by the Court of Queen's Bench, in *In re Bahia and San Francisco Railway Company* (2), that such an estoppel might arise where a certificate was issued stating that the person

(2) Law Rep. 3 Q. B. 584.

named in it was the registered holder of certain shares in the company. The persons named in the certificate of the Bahia and San Francisco Railway Company having sold to a purchaser who was registered as holder, his name was afterwards removed on its being discovered that the transfer to the persons named in the certificate was a forgery. The Court held that the giving of the certificate amounted to a statement by the company, intended by them to be acted upon by the purchasers of shares in the market, that the persons certified as the holders were entitled to the shares; and that the purchasers having acted on that statement by the company, they were estopped from denying its truth and liable to pay as damages the value of the shares.

Blackburn, J., in the course of his judgment, remarked that when joint stock companies were established, it was a great object that the shares should be capable of being easily transferred; that the Legislature had accordingly provided for the keeping of a register of the members, in order to keep which the company must alter the register whenever there was a transfer of its shares; and the learned Judge drew attention to section 31 of the Companies Act, 1862, which provides that a company may give certificates, and that these shall be *prima facie* evidence of the title of the person named to the shares specified, and pointed out that by granting the certificate, the company make a statement that they have transferred the shares specified to the person named in it, and that he is the holder of the shares; that if the company have been deceived and the statement is not true, they may not be guilty of negligence, *but they and no one else had power to inquire into the matter.* The learned Judge expressed the opinion that it was the intention of the Legislature that these certificates should be documents on which buyers might safely act, and continued thus: "It is quite clear that a statement of fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might act. And the claimants having *bona fide* acted upon that statement, and suffered damage, can they recover from the company? I think they can on the principle enunciated in *Freeman* v. *Cooke* (3)."

The decision in the *Bahia and San Francisco Railway Case* (2) was followed under somewhat different circumstances by the Court of Exchequer in *Hart* v. *Frontino and Bolivia South*

(3) 2 Ex. 654.

American Gold Mining Company (4). The plaintiff in that action bought and paid for shares in the defendant company, and received duly executed transfers and share certificates, which certified that the person named in the register of shareholders was the proprietor of five shares, numbered, etc. The seller of the shares being afterwards compelled to pay a call upon them, demanded repayment from the plaintiff, who required to have the transfer completed by registration. His name was accordingly entered on the register, and he received from the company a certificate that he was the proprietor of the shares. On the faith of this certificate, he repaid the seller the amount of the call. The company having discovered that the shares had been sold by a previous owner by a duly executed transfer to another person, removed the plaintiff's name from the register and inserted the name of that person. It was held that by the registration of the plaintiff and the delivery to him of the certificate, followed by the payment by him of the call, the defendants were estopped from denying his title to the shares and were liable to pay for their value.

The learned counsel for the appellants impeached these decisions, as they were entitled to do in your Lordship's House, and contended that they ought to be overruled.

After carefully considering the able arguments urged at the Bar, I have no hesitation in expressing my concurrence in the law laid down by the Court of Queen's Bench in *In re Bahia and San Francisco Railway Company* (2). The reasoning of Blackburn, J., in pronouncing judgment in that case, appears to me to be sound and in accordance with the law, and I think it would be very mischievous to cast any doubt on the authority of that case.

The appellants argued, however, and correctly, that the present case is distinguishable from that in the Queen's Bench, inasmuch as it is not the purchasers who are seeking to render the company liable by way of estoppel, but the vendor of the shares, who himself received the certificate from the company. Does that, in the circumstances which your Lordships have to consider, make any difference? If the company must have known, as was said in the *Bahia and San Francisco Railway Case* (2), that persons wanting to purchase shares might act upon the statement of fact contained in the certificate, it must equally have been within the contemplation of the company that a person receiving

(4) Law Rep. 5 Ex. 111.

the certificate from them might, on the faith of it, enter into a contract to sell the shares. The plaintiff did enter into such a contract, and thereby altered his position by rendering himself liable to the persons with whom he contracted to sell the shares. All the elements necessary to create an estoppel would appear, therefore, to be present. The appellants, however, relied upon the decision in *Simm* v. *Anglo-American Telegraph Company* (5) as shewing that one who receives from a company a certificate that he is the proprietor of shares therein is not in the same position as regards his rights by estoppel against the company as a transferee from him would be.

In that case, Burge, who was the buyer of stock in the defendant company, received in pursuance of his purchase a transfer of the stock purporting to be executed by Coates's, who was the registered owner of stock to the amount purchased. The transfer was, in fact, forged by a clerk in Coate's employ. Burge having borrowed money from a bank, the stock was transferred to Ingelow as trustee for the bank, and the company registered Ingelow as the owner, and issued a certificate accordingly. The advance having been repaid by Burge, the bank's trustee became trustee for him. The company having discovered the forgery, and refused to recognize Ingelow as the owner of the shares, an action was brought by Burge and Ingelow to compel the company to recognize their title. It was held by the Court of Appeal that they had no title by estoppel as against the company. The grounds for the decision appear to have been two-fold: in the first place, that Burge had not altered his position by reason of the statement in the certificate; in the next place, that he had himself by producing to them a forged transfer induced the company to insert the name of his nominee as the proprietor of the stock.

Neither of these grounds applies in the case before your Lordships. I have already shewn that the plaintiffs did alter their position by entering into a contract which imposed liability upon them, and they did not in any way mislead the company into registering the plaintiff Tomkinson as a shareholder and giving the certificate relied on. The company had certified the transfer to the plaintiffs—that is, they had stated in effect that there was in their possession a certificate shewing the title of Powter to make the transfer to them; they knew, and the plaintiffs did not, that they had already certified a transfer of these

(5) 5 Q. B. D. 188.

very shares from Powter to Maitland and Balfour, and that the certificate referred to in their indorsement "Certificate lodged" bore on the face of it a statement shewing that this was the case. I can see nothing, therefore, in the circumstances under which the plaintiffs obtained the certificate to deprive them of the right to claim by way of estoppel against the company.

The case of the *Directors, etc., of the Ashbury Railway Carriage and Iron Company* v. *Riche* (6), which was much pressed upon your Lordships in the argument for the appellants, appears to me to have no bearing on the question at issue between the parties to this appeal. The argument was put, as I understand, in this way: The company, it was said, are only authorized to issue a limited number of shares; and to hold it liable by estoppel, as is sought to be done in this case, to a person who is not the proprietor of any of those shares, would in effect enable them to contract a liability in respect of shares beyond their authorized issue. I do not think this argument is a sound one. A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not by reason thereof become a shareholder. Indeed, the very title by estoppel implies that he is not one. It has never been laid down and is manifestly not the law that a company is not authorized to employ its funds in paying damages for a wrong done, and if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one.

It remains to consider whether the plaintiffs are entitled to recover as damages the sum which they have had to pay in order to purchase shares to enable them to carry out their contract. It is certain that this expenditure became necessary because, and only because, the company refused to register the purchasers. But it is said that the sum thus expended is nevertheless not recoverable. It was argued that in respect of the refusal to register a transfer from him, a shareholder can recover nominal damages only. This may, no doubt, be so in some cases. In my opinion, it cannot be laid down as a proposition applicable to all cases that a person claiming by estoppel against a company is limited to nominal damages only in respect of the refusal to register a transferee from him.

Again, it was said that the company have a certain discretion allowed them, and were not bound to register every person to

(6) Law Rep. 6 H. L. 653.

whom a shareholder might choose to transfer his shares. This is also true; but in the present case, the refusal was not based on any exception taken to the proposed transferees; it was grounded upon a denial of the title of the intending transferor, to whom a certificate of his proprietorship of the shares had been issued by the company. In such a case, I can see no good reason why, if he can establish an estoppel against the company, he should not be entitled to recover the damages which he has in fact sustained owing to the refusal of the company to register. But it is contended that some deduction ought to be made from the sum of £717 10*s.* in respect of the amount received from the purchasers of the shares. I agree with the Court below in seeing no ground for such a deduction. If the company had registered the purchasers of the shares (which in assessing the damages it must be taken as against them they were bound to do), these moneys would equally have been received, and the £717 10*s.* would not have been expended.

My Lords, for the reasons I have given, I think the judgment appealed from ought to be affirmed, and this appeal dismissed with costs.

Lord Macnaghten and Lord Field delivered judgments concurring.

The Transfer of Shares. Exercise of Discretion by Directors as to Registration.

In re BELL BROTHERS, LIMITED; Ex parte HODGSON.

1891, 7 T. L. R. 689.

CHITTY, J.

In delivering judgment, it was said by

Chitty, J.:—According to the constitution of this company, every shareholder is entitled to transfer his shares to any person not being an infant, lunatic, married woman, or under any legal disability. This right, which is a right of property, is subject to the discretionary power conferred on the directors by articles 18 and 34, of approving of the person to whom the transfer is made and of rejecting the transfer on the ground that they do not approve

of the transferee. The discretionary power is of a fiduciary nature, and must be exercised in good faith; that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it, the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting. When the Court once arrives at the conclusion that the directors have in good faith rejected a transfer on the ground that the transferee is not a fit person to become a member of the company, it will not review the directors' decision. The directors are not bound out of Court to assign this reason for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, giving such evidence, they refrain from stating their reasons, the Court will not, merely on that account, draw unfavourable inferences against them. In these articles, there is an express provision protecting the directors against any liability to disclose their reasons. They are, however, at liberty, if they think fit, to disclose them, and if they do, the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not; or, in other words, to ascertain whether the directors have proceeded on a right or a wrong principle. If the reasons assigned are legitimate, the Court will not overrule the directors' decision merely because the Court itself would not have come to the same conclusion. But if they are not legitimate, as, for instance, if the directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees, the Court would hold that the power had not been duly exercised. So, also, if the reason assigned is that the transferee's name is Smith, or is not Bell. Where the directors do not assign any reason, it is still competent for those to seek to have the transfer registered to shew affirmatively, if they can, by proper evidence that the directors have not duly exercised their power. These principles are deducible from the authorities, among which the more important are *In re Gresham Life Assurance Company—Ex parte Penney* (1), *Moffat* v. *Farquhar* (2), *The Stranton Iron Company* (3), *Pinkett* v. *Wright* (4), and *Robinson* v. *The Chartered Bank* (5), as explained

(1) L. R. 8 Ch. 446.
(2) L. R. 7 Ch. D. 591.
(3) L. R. 16 Eq. 559.
(4) 2 Hare 120.
(5) L. R. 1 Eq. 32.

by Lord Justice Mellish in *Ex parte Penney* (p. 452). The case of the applicants, who are one of the transferors and the transferee, is that the directors have rejected the transfer on the ground that the transferee is not a member of the Bell family by blood or marriage; and that the directors are acting upon a fixed policy to exclude all persons who are not members of that family. For the applicants, it is contended that this is a just conclusion from the facts proved. If they have made out this case in point of fact, they are entitled to succeed. The objection, although personal to the transferee, would not be legitimate. The constitution of the company is not such as would justify the directors in excluding from membership all persons who are not members of the Bell family.

* * * * * * *

The case required a careful examination of the leading facts. Upon them, I come to the conclusion that the real and only reason why the directors rejected the transfer was their policy to keep the shares in the hands of members of the Bell family, and they disapproved of Mr. Hodgson for the sole reason that he was not a member of that family. But then it is said that the Court cannot order the registration of the transfer because it is a condition precedent that the transferee shall be approved of by the directors. This point arose and was overruled by Vice-Chancellor Malins in *Moffatt* v. *Farquhar* (2), and, as I think, rightly. Having had an opportunity of exercising their power, and having attempted to exercise it upon a wrong principle, I think the power is gone, and that the right to transfer remains absolute. I treat the case as resulting in this. The directors have no ground of objection against Mr. Hodgson, except the one which is not within the legitimate purpose of their power; they have in substance approved of him, subject only to an inadmissible objection. It would be idle, as well as unjust, to send the matter back to them for further consideration. In the exercise of such a power, the directors must act promptly; they have wrongly interposed delay. The 35th section of the Companies Act of 1862, under which the motion is made, expressly treats unnecessary delay as a ground for rectifying the register. In adjudicating under this section, the Court is not bound to follow what a Court of law would do on the application for a *mandamus* or the like, but will take into consideration any principle of equity applicable to the case (see *Ex parte Parker*) (6). For these reasons, I make the order for registration, as asked. The respondents must pay the costs.

(6) L. R. 2 Ch. 685.

Provision for Compulsory Transfer.

BORLAND'S TRUSTEE v. STEEL BROTHERS & CO.

1900, 70 L. J. Ch. 51.

THE CHANCERY DIVISION.

Trial of action.

This action was brought by the trustee in the bankruptcy of J. E. Borland. Between the years 1872 and 1890 the bankrupt was partner in a firm of East India merchants, carrying on business as merchants, commercial agents, and rice millers in London, at Rangoon, and at other places under the style of "Steel Bros. & Co." In 1890 this business was converted into a private limited company, with a nominal capital of £400,000 divided into 4,000 shares of £100 each. As an equivalent to his interest in the former partnership, the bankrupt received 250 shares in the new company, with £80 credited as paid up on each share.

In the year 1897 new articles of association were adopted by the company by special resolution confirmed on June 11, and it was agreed that of the 3,200 shares in the company already issued, 1,600 (upon which £100 per share had been paid up) should be treated as preference shares, and the other 1,600 (upon which £80 per share had been paid up) should be treated as ordinary shares. The bankrupt, accordingly, in pursuance of this arrangement, received 160 preference and 80 ordinary shares in exchange for his original holding.

Clause 3 (*d*) of the memorandum of association stated that one of the objects for which the company was established was "to transact and carry on all kinds of agency business."

Article 47 of the new articles of association provided (*inter alia*) that each of the then respective present holders of certain ordinary shares therein specified (among which were the ordinary shares then held by J. E. Borland), should be held entitled to continue to hold the shares then held by him, or any of them, till he should die, or voluntarily transfer the same, or should become bankrupt. Article 48 provided that no ordinary share which should for the time being remain entitled (*inter alia*) to the exemption or special right conferred by article 47, should be liable to be compulsorily taken or purchased under any provision of the articles enabling shares to be compulsorily taken or purchased.

Article 49 provided (*inter alia*) that none of Borland's ordinary shares should be transferred to any person not being a "manager or assistant"—these being certain working members of the company—so long as any "manager or assistant" should be willing to purchase the same at its "fair value."

Article 50 provided that, in order to ascertain whether any "manager or assistant" were willing to purchase a share, the proposing transferor should give notice in writing (thereinafter called the transfer notice) to the company that he desired to transfer the same. Such transfer notice was to specify the sum which the transferor fixed as the fair value, and was to constitute the company his agent for the sale of the share to any "manager or assistant" at the price so fixed.

Article 52 provided that if the company should, within fourteen clear days after being served with such transfer notice, find a "manager or assistant" willing to purchase at the price aforesaid any share comprised in the transfer notice, and should give notice thereof to the intending transferor, he should be bound, on payment of the purchase-money, to transfer such share.

Article 53 provided that the sum fixed by a transfer notice as the fair price for a share should in no case exceed the par value of the share; and that the par value of the share should, for the purpose of the article, be deemed to be the amount paid up, or properly credited as paid up, on such share, plus, in the case of an ordinary share, (*a*) a sum bearing the same ratio to the market value of the investments of the reserve fund account of the company as the capital paid up on the share sold should bear to the total paid-up ordinary capital; (*b*) a sum equal to one quarter of a sum bearing the same ratio to the company's "Plant Depreciation Account" as the capital paid upon the share sold should bear to the total paid-up ordinary capital; and (*c*) interest at 5 per cent. per annum on the total sum arrived at after making such additions as aforesaid, computed from such times and in such a manner as were therein more particularly specified. And it was further provided by the same article that a certificate of the auditor of the company should be final and conclusive on all parties as to the par value of any share.

Article 55 provided that, if the company should not within the space of fourteen clear days after being served with the transfer notice find a "manager or assistant" willing to purchase the share and give notice in manner aforesaid (article 52), the intending transferor should, at any time within three calendar months afterwards, be at liberty, subject to certain provisions therein specified, to sell and transfer the shares, or those not placed, to any person and at any price, provided that such price should not be, without the consent of the directors, lower than the price fixed by the transferor in the transfer notice as the fair value.

Article 58 provided that in every case in which ordinary shares were held by a person not being a "manager or assistant," the directors might at any time give to such person notice in writing requiring him forthwith to transfer all or any of such shares, and unless within fourteen days afterwards he should give a transfer notice in respect thereof, he should at the end of such period be deemed to have given such notice in accordance with article 50, and to have specified the par value of the shares as defined by article 53 as the sum he fixed as the fair value thereof, and that the subsequent proceedings might be taken on that footing.

Article 58a provided that no notice should be given under the last preceding article requiring the transfer of any ordinary share which was for the time being entitled to any of the exemptions or special rights conferred by articles 47 and 48; and also that no such notice should be given in respect of any ordinary share whatever, except during the one month next after a general meeting of the company at which an annual dividend on the ordinary shares had been either declared, or, profits permitting, would have been declared.

Article 72 provided that general meetings should be held once in every year, at such time and place as might be prescribed by the company in general meeting; and if no other time or place should be prescribed, in the month of April in every year, at such time and place as might be determined by the directors.

It was admitted that the above articles of association were rendered necessary by the circumstances of the company in 1897.

Its business at Rangoon and at other foreign places was carried on by "managers" and "assistants," who received very small commissions, and looked to the dividends received by them on the shares they held in the company for the real remuneration of their services. The amount of these dividends fluctuated largely—for example, from £51 per share in 1893 to £2 12s. 6d. a share in 1896; and the "managers" and "assistants" were greatly dissatisfied in 1897 that so large a proportion of the profits was received by the non-working members of the company. The new set of articles containing the clauses above set out was accordingly adopted, with a view to meeting this dissatisfaction on the part of persons who practically controlled the fortunes of the company, by holding out to them the prospect of gradually acquiring from time to time a larger interest in the capital of the company. No suggestion of any kind of *mala fides* was brought against any part of the transaction.

A receiving order was made against Borland on November 14, 1899, and on February 22, 1900, he was adjudicated bankrupt, and the plaintiff was appointed trustee of his estate. At the date of his bankruptcy Borland retained only seventy-three of his ordinary shares in the company, and he was not at the time a "manager or assistant."

On March 7, 1900, the plaintiff received notice from the directors of the company, in pursuance of article 38, requiring him forthwith to give to the company a transfer notice within the meaning of article 50 in respect of the seventy-three ordinary shares then held by him; and further notice that, unless, within fourteen days from the receipt thereof, he should give to the company such transfer notice in respect of the said shares, he would, at the expiration of that period, pursuant to the said article 58, be deemed to have given such transfer notice in accordance with the said article 50, and to have specified the par value of the shares as defined by article 53 as the sum he had fixed as the fair value thereof, and that the subsequent proceedings would be taken on that footing.

The par value of the said seventy-three shares, calculated in accordance with the articles, amounted to about £8,000. The dividend paid for the year 1899 in respect of the said seventy-three ordinary shares was £2,190, which was at the rate of 37½ per cent. upon the amount paid up on each share; and the plaintiff alleged that the real value of the said seventy-three shares amounted to £34,000 or thereabouts. The plaintiff accordingly commenced the

present action against the defendant company on March 21, 1900, asking—First, for a declaration that the company were not entitled to require the transfer of any of the said seventy-three shares at any price whatever, and that the "transfer articles" were void; and secondly, for an injunction to restrain the company, their officers and agents, from calling for, enforcing, or effecting a transfer of all or any of the said seventy-three ordinary shares at any price whatever, or, alternatively, at any price less than the fair and actual value of such shares.

It appeared from the evidence given at the trial that a general meeting of the company, at which an annual dividend on the ordinary shares had been declared, had been held on February 16, 1900, but that the time and place of such general meeting had not previously been prescribed by the company in general meeting in accordance with article 72.

Farwell, J., after stating the facts and reading the articles of association set out above, continued as follows: It is said that the provisions contained in these articles compel a man, at any time during the continuance of this company, to sell his shares at a particular price to be ascertained in a manner indicated, and to particular persons. Two arguments have been founded on this view of the facts. It is said, first of all, that such provisions are repugnant to absolute ownership. It is said, further, that they tend to perpetuity; and they are likened to the case of a settlor or testator, who settles or bequeaths a sum of money subject to executory limitations, which are to arise in the future, the interpretation of these articles according to the plaintiff being, that, if at any time hereafter during centuries to come the company should desire the shares of a particular person not being a manager or assistant, such person would be bound to sell.

To my mind that is applying to company law a principle which, so far as I know, is wholly inapplicable. It is the first time that any such suggestion has been made: and it rests, to my mind, on a misconception as to what a share in a company really is. A share, according to the plaintiff's argument, is a sum of money which is dealt with in a particular manner by way of executory limitations. To my mind a share is nothing of the sort. It is the interest of a shareholder in the company measured by a sum of money for the purposes—first, of liability; and secondly, of interest; but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with sec. 16 of the Companies Act, 1862. The contract contained in the articles

of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money, and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount. That seems to me to be the proper view, having regard to the authority of *New London and Brazilian Bank* v. *Brocklebank*. (1) That was a case in which trustees bought shares in a company which were subject to an article of association to the effect that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him, either alone or jointly with any other person; and to the further effect that when a share should be held by more persons than one, the company should have a like lien and charge thereon in respect of all moneys owing to them from all or any of the holders thereof, alone or jointly with any other person. One of the trustees was a partner in a firm which afterwards went into liquidation at a time at which it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees. It was held that the shares were subject to the lien mentioned for the benefit of the company, notwithstanding the interest of the *cestuis que trust* which was said to be paramount. Had there been any substance in the suggestion now put forward—that is, that the right to the lien was a right to an executory lien arising from time to time as the necessity for it arose, it might have been advanced in that case; but the decision is based on a ground inconsistent with such a contention—that is, that the shares were subject to this particular lien in their inception and as one of their incidents. Jessel, M.R., likened it to the case of a lease. Lord Justice Holker said: "It seems to me that the shares having been purchased on those terms and conditions, it is impossible for the *cestuis que trust* to say that those terms and conditions are not to be observed."

Then it is said that this is contrary to the rule against perpetuity. Now, in my opinion, the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that proposition, *Witham* v. *Vane* (2) is a direct authority of the House of Lords; and to my mind an even stronger case is that of *Walsh* v. *Secretary of State for India*. (3) A stronger instance of the unlimited extent of personal liability could hardly be found; in that case the old East India Company entered into a

(1) 51 L. J. Ch. 711; 21 Ch. D. 302.
(2) Challis, Law of Real Property (2nd ed.), Appendix V. p. 401.
(3) 32 L. J. Ch. 585; 10 H. L. C. 367.

contract, in 1770, with the first Lord Clive, to the effect—to put it shortly—that in the event of the company ceasing to be possessors of the Bengal territories, they should repay to Lord Clive, his executors or administrators, several lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selborne pointed out in *Witham* v. *Vane,* (2) the question of perpetuity was tentatively raised in the House of Lords; but Lord Cairns, who was counsel in that case, refrained, with his usual discretion, from pressing it. I have said that the articles now under consideration are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under section 16 of the Companies Act, 1862; Mr. Borland was one of the original shareholders, and he and his trustee in bankruptcy are bound by his own contract. I do not know that I am concerned to consider the case of other shareholders who come in afterwards; but were it so, the answer, so far as they are concerned, is this—that each of them on coming in executes a deed of transfer, which, on the terms in which it is executed, makes him liable to all the provisions of the original articles. Mr. Borland cannot be heard to say that there is any repugnancy or perpetuity in the covenant he has entered into; and his trustee in bankruptcy stands in this respect in no better position than Mr. Borland himself. Counsel for the plaintiff attempted to apply the reasoning in *Gomm's Case* (4) to the present, and to argue that if the contract was merely personal it did not affect the trustee in bankruptcy, and that if it was an executory limitation it was void. But this is, in my opinion, unsound; the trustee is as much bound by these personal obligations of the bankrupt as the bankrupt himself, if he were not bankrupt, would be.

There remains the question whether or not these provisions are a fraud on the bankruptcy law. To adopt the words of Lord Justice James in *Jay, ex parte; Harrison, In re,* (5) "a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to some one else and be taken away from his creditors, is void as being a violation of the policy of the bankruptcy law." In the present case, however, I find that all the shares are subjected to article 58. There is no idea of preferring any one person to another, except so far as is pointed out by article 47, under which, by contract, the original shareholders at the time of the passing of the special resolution for the new articles retained for themselves the right

(4) 51 L. J. Ch. 530; 20 Ch. D. 562. (5) 14 Ch. D. 19.

to refuse the compulsory sale of their shares until they should die, or voluntarily transfer the same, or should become bankrupt. It is said that these last words constitute a fraud on the bankruptcy law, and render that particular provision void. In my opinion, that is not so. If I once arrive at the conclusion that these provisions were inserted *bona fide*—and that is not contested—and if I also come to the conclusion that they constitute a fair agreement for the purpose of the business of the company, and are binding equally on all persons who come in, so that there is no suggestion of fraudulent preference of one over another—there is nothing obnoxious to the bankruptcy law in a clause which provides that if a man becomes bankrupt he shall sell his shares. That is the first step; and I am not sure that counsel for the plaintiff would have contested that alone. The next step is, At what price is a man to sell? Now I find that the price is a fixed sum for all persons alike; no difference in price arises in case of bankruptcy: the effect of bankruptcy is merely to except the bankrupt from the privileges of article 47. The particular benefit reserved to them is by contract abrogated in the case of their becoming bankrupt for the purpose of giving effect to the general object of the articles—that is, that they should have in the company none but managers and workers in Burmah, unless the company desired otherwise. There is nothing repugnant to any bankruptcy law in such a provision as that. Is there, then, anything repugnant in the way in which the value of shares is to be ascertained? If I came to the conclusion that the effect of these provisions was to compel persons to sell in the event of bankruptcy at something less than the price that they would otherwise obtain, the provisions would then be clearly repugnant to the bankruptcy law. But that is not the case. They all stand on the same footing, and the proper value is to be ascertained for all alike. These shares can have no value ascertainable by any ordinary rules, because having held, as I do hold, that the restrictive clauses are good, it is impossible to find a market value. There is no quotation. It is impossible therefore for any one to arrive at any actual price which you can clearly pronounce to be the value or the approximate value. Having regard to the fluctuation in profits that has occurred in the case of this company, it is impossible to say that there is any 10 or 20 per cent. profit, which is the basis of the plaintiff's case. All such calculations must be illusory. If it were necessary—I do not think it is—I should be prepared to hold upon the evidence that the price offered by the company in this particular case is fair value. So far as I can see the terms are

reasonable; and, assuming that it is a fair mode of arriving at the value—and I think it is—I do not see that it differs from the ordinary provision for valuation, such as I find in *Whitmore* v. *Mason,* (6) applicable to those cases where assets are capable of valuation. I have to bear in mind that I am now dealing with a company whose assets are really, in a sense, incapable of valuation, but in which the parties have agreed on a valuation, which, as it seems to me, is a fair one. I think I should be straining the principle of the cases on fraud on bankruptcy if I were to come to the conclusion that an agreement like this, which was come to between the parties after discussion and discontent on the part of some of them, ought to be set aside on the suggestion that it might result in an unfair price. The particular passage to which counsel for the defendant referred in the case of *Whitmore* v. *Mason* (6) was at the end of the judgment. In that case Vice-Chancellor Page-Wood had before him a partnership deed which contained an article under which, in case of bankruptcy, the partners were to forfeit the whole value of a certain lease. That was held to be bad; and had there been anything of the sort here, I should, of course, have held it bad too. But there was also a provision, which Vice-Chancellor Page-Wood held good, that there was to be a valuation of the share of the bankrupt partner, and the Vice-Chancellor says at the end of his judgment: "Where there is a *bona fide* intention to secure the going on of the concern by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws." In my opinion, that actually expresses the facts of the present case as proved to me, and I think I am following that case when I hold that there is no fraud on the bankruptcy law in the present case.

Then there are one or two other, somewhat minor, points made by counsel for the plaintiff. First, he says that these provisions are *ultra vires.* That, of course, depends upon the provisions of the articles which constitute the machinery by which the compulsory sale is to be carried out. The company is constituted an agent for receiving purchase-money, and I do not think it did more than that; and it is constituted agent for sale to the shareholder who is asked to sell. Counsel for the plaintiff says, in the first place, that that is not within the memorandum of association. In my opinion, it is within the words of sub-section *d* of clause 3 of the memorandum. Then it is said that it is contrary to the Companies Act, 1862, and is, in that sense, *ultra vires.* I cannot

(6) 31 L. J. Ch. 433: 2 J. & H. 204.

myself see that this arrangement is in any sence a trafficking in shares, or that the company is in any way mixed up in anything contrary to the statute. In my opinion, that contention fails.

The last point is a technical one, and turns on article 58A. [His Lordship read the article.] Now it appears that the notice was given on March 7, and that the general meeting at which the dividend was declared was held on February 16. It is said that this latter was not a general meeting properly so-called, for the reason that it was not called in accordance with the conditions laid down by article 72. I am told, however, that a general meeting had never been called in April at all. It was held in February and in March in the preceding years. Under those circumstances I consider that the company has waived article 72; and on the question whether the terms of article 58A have been complied with, and whether the notice has been given during the first month next after a general meeting of the company at which an annual dividend on the ordinary shares has either been declared or, profits permitting, would have been declared—I consider that it is clear that the only dividend was in this instance declared at the meeting on February 16, and that the plaintiff has either accepted or applied for it. That disposes of all the points that have been raised; and the necessary result is that I dismiss the action with costs.

NOTE.—*It has not been thought well to omit the references to the Bankruptcy Laws. By analogy they may be of use in the light of Provincial Laws against voluntary or preferential transactions by insolvents.*

Possession of Share Certificate. Transfers in Blank. Equitable Mortgage. Priorities.

THE SOCIÉTÉ GÉNÉRALE DE PARIS AND G. COLLADON v. JANET WALKER. ET AL.

1885, 11 App. Cas. 20.

THE HOUSE OF LORDS.

James Montgomery Walker, holding 100 shares in the Tramways Union Company, Limited, in March, 1881, executed a blank transfer and deposited it and the certificates of his shares with

James Scott Walker as security for a debt to him. The transfer was not executed by the transferee, and did not contain any name or date or the number or numbers of the shares.

On or about the 15th of December, 1882, James Montgomery Walker, being pressed by the appellants for a debt owing to them, executed a blank transfer which by a contemporaneous memorandum he called a "transfer for 100 Tram Unions," and sent it with the memorandum to Colladon, the appellants' manager. This transfer contained the name of the transferor and the date "14th of December, 1882," but not the name of any transferee, nor the number or numbers of the shares. Colladon at once applied to James Montgomery Walker for the certificate of the shares and was told by him that it had been lost or mislaid. The appellants were desirous of selling the shares and, for that purpose, of having the transfer put in order. With this object communications passed between Colladon and a clerk in the office of the Tramways Union Company, and between Colladon and James Montgomery Walker. In the result, the transfer was stamped, and the blanks were filled up with the name of Colladon as the transferee, and with the number and numbers of the shares, and the transfer was executed by Colladon. In this state, it was on the 30th of December, 1882, sent by Colladon to the office of the Tramway Union Company with a request to "certify the transfer" and a letter of indemnity against any loss which might arise in the event of the missing certificates being forthcoming at any future time. The company's clerk said that an indemnity by James Montgomery Walker's bankers would be required. This was offered, but the clerk refused to "certify the transfer." The appellants contended that what passed between Colladon and James Montgomery Walker before the 30th of December amounted or was equivalent to a redelivery of the transfer deed after the blanks had been filled up, but the House held that there was no sufficient evidence of this.

On the 4th of January, 1883, the respondents, executors of James Scott Walker (who had died in February, 1882), gave notice to the company that they were in possession of the share certificates and a transfer, signed by J. M. Walker, and warned the company not to allow J. M. Walker to deal with the shares.

The Tramways Union Company was incorporated under the Companies Act, 1862. The articles of association material to this report were as follows:—

Article 22. The company shall not be bound by or recognize any equitable, contingent, future, or partial interest in any share, or any other right in respect of a share, except an absolute right thereto in the person

from time to time registered as the holder thereof, and except also as regards any parent, guardian, committee, husband, executor or administrator, or trustee in bankruptcy, his right under these presents to become a member in respect of or to transfer a share (1).

(1) By section 30 of the Companies Act, 1862, (25 & 26 Vict. c. 89), "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England and Ireland."

VII. Transfer of Shares.

Article 26. Subject to the exercise by the company of the powers conferred by the Companies Act, 1867, of issuing share warrants to bearer and to any regulations of the company in that behalf, shares shall be transferable only by deed executed by the transferor and transferee and duly entered in the registrar of transfers.

Article 28. The register of transfers shall be kept by the secretary under the control of the board.

Article 32. A person shall not be registered as the transferee of a share until the instrument of transfer duly executed has been left with the secretary to be kept with the records of the company, but to be produced at every reasonable request and such transfer fee has been paid as is provided by or in accordance with the last article, but in any case in which in the judgment of the board this article ought not to be insisted on it may be dispensed with.

VIII. Share Certificates.

Article 33. The certificates of shares shall be under the seal, and shall be signed by one director and countersigned by the secretary.

Article 35. If any certificate be worn out or lost, it may be renewed on such proof as satisfies the board being adduced to them of its being worn out or lost, or in default of such proofs on such indemnity as the board deem adequate being given, and an entry of the proof or indemnity shall be made in the minutes of their proceedings.

Each certificate was sealed with the company's seal and contained the following:—

Note.—No transfer of any portion of the shares represented by this certificate will be registered until the certificate has been delivered at the company's office.

On the 6th of January, 1883, the appellants brought the present action against the Tramways Union Company and the executors of James Scott Walker. The action having been stayed as regards the company, the appellants claimed as against the executors a declaration of title to the shares; that the executors should deliver up to the appellants the certificates and the transfer; and injunction to restrain the executors from requiring any registration of or dealing with the shares otherwise than as the appellants should direct.

Lopes, J. (who heard the action without a jury) gave judgment for the plaintiffs. The Court of Appeal (Brett, M.R., Cotton and Lindley, L.JJ.) reversed this decision and entered judgment for the defendants.

From this decision, the plaintiffs appealed.

THE EARL OF SELBOURNE:—My Lords, the appellants in this case cannot succeed unless they shew, either that they have acquired a legal title to the shares in question, unaffected, as between them and the respondents, by any equity; or that (both titles being equitable) their equity, though posterior in time, ought to be preferred to that of the respondents.

A complete legal title to these shares could not be acquired without registration: and there has been none. The transfer, however, from James Montgomery Walker, under which the appellants claim, had been produced for registration to the officers of the Tramways Union Company before the 4th of January, 1883, at which time the request for such registration was met by the opposing claim of the respondents, stated in their letter of that date to the secretary of the company. It seems to have been thought (though not decided) in the Courts below, that if the appellants' transfer (signed in blank, and without any numbers of shares or name of transferee) had been delivered by the transferor as his deed after the blanks were filled up, the appellants would have had a legal title, preferable (as such) to the equitable title of the respondents. Without such delivery, the completed transfer was not James Montgomery Walker's deed: *Hibblehrite* v. *McMorine* (2). *Tayler* v. *Great Indian Peninsular Railway Company* (3). *Swan* v. *North British Australasian Company* (4).

The Courts below both thought (and I agree with them) that there was not, as against the respondents, any sufficient evidence of a delivery of the completed transfer by James Montgomery Walker. But even if there had been such evidence, I should not myself have considered a merely inchoate title by an unregistered transfer equivalent for the present purpose to a legal estate in the shares. Such a transfer might, indeed, give a legal right of action against the company if they, without just cause, refused to register it; it might also be a good foundation for an application to a competent Court to rectify the register. But it could not, under the 26th article of association of the Tramways Company confer (while unregistered) a legal title to the shares themselves: nor do I think that the fact of its execution and of a claim having been made to register it before the company had notice of the prior equitable title, would necessarily make it the duty of the company, after receiving such notice, to register it, or of a Court to compel them to do so, and thereby to effectuate a fraud, till then incomplete. If, indeed, all necessary conditions

(2) 6 M. & W. 200. (3) 28 L. J. Ch. 285.
(4) 7 H. & N. 603; 2 H. & C. 175.

had been fulfilled to give the transferee, as between himself and the company, a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title, the case might be different. But, in this case, I am of opinion that the appellants had not, on the 4th of January, 1883, any such right, even if the transfer, after the blanks were filled up, had been delivered as his deed by James Montgomery Walker. That transfer was not accompanied by the certificates which, in companies of this kind, are the proper (and, indeed, the only) documentary evidences of title in the possession of a shareholder, and which, according to the usual course of dealing with such shares, ought to come into the hands of a *bona fide* transferee for value. The respondents, when they took their proper security, did obtain possession of those certificates; and on the face of each such certificate there was an engagement under the company's common seal that no transfer of any portion of the shares thereby represented should be registered without delivery of the certificate at the company's office. The appellants did not, indeed, know that the certificates were thus in the respondents' hands; and they may not have known that they were in that form. But they knew that they had not themselves got them; and that the company (as was said by Lord Cairns in the case of the *Shropshire Union Company* (5), though it might not be bound to insist on their production before registering a transfer, was at least entitled to do so if it thought fit. They knew (as their manager, Mr. Dove, in his evidence admitted) that their own transfer was one which was "no good," "not in order," "of no value," for want of these certificates. The company (or those who in this matter acted for it) did in fact refuse to register that transfer without production of the certificates, unless the requisites for the issue of new certificates under their 35th article of association were first satisfied; and the liability which they might be under to any *bona fide* holder of the outstanding certificates was (in my judgment) an amply sufficient reason for that refusal. Those requisites were never satisfied, either before or after (if they could have been satisfied after) the 4th of January, 1883, on which day both the company and the appellants became aware that the certificates had not been lost or mislaid (as James Montgomery Walker had falsely alleged), but they were in the hands of the respondents as *bona fide* holders for value prior in date to the appellants.

The appellants, therefore, have not shewn either a legal title to these shares, or (or as between themselves and the company) an

(5) Law Rep. 7 H. L. 509.

absolute and unconditional right to be registered as shareholders in place of James Montgomery Walker. Unless they can establish a right on equitable grounds to displace the original priority of the respondents, that priority must remain; and must, under these circumstances, prevail. Have they then made out any equitable case as against the respondents? I not only think that they have failed to do so, but I think the respondents have the better equity, not on the ground of time alone, but on the merits of the case. The respondents not only had the certificates, but they had the company's undertaking under seal that there should be no change of the registered title unless those certificates were produced. What more could be necessary, on any reasonable or intelligible principle, to "perfect" their equitable title, which they were under no obligation to convert into a legal title by registration? If they had given any notice of the kind required in cases within the principle of *Dearle* v. *Hall* (6), to the company, they would not thereby have constituted, between themselves and the company, any such relation as, in cases of that class, is the effect of notice. I think that according to the true and proper construction of the Companies Act of 1862, and of the articles of this company, there was no obligation upon this company to accept, or to preserve any record of, notices of equitable interests or trusts, if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust: and if the company is not affected by it, I do not see how the directors or officers of the company individually can be. The Court of Appeal, without reference to the certificates, thought the principle of *Dearle* v. *Hall* (6) inapplicable to shares of this kind; and I agree with them. I do not understand in what respect a notice not operative as against the company or its officers can have the effect of "perfecting" the equitable assignee's title. No authority was cited to shew that the doctrine of *Dearle* v. *Hall* (6) had been applied to such shares; and the reasons for that doctrine are, in my judgment, not applicable. The case is not like those under the bankrupt laws, in which the fact, or presumption, of a continuance (after a change in the equitable title) of the prior state of "order and disposition," or reputed ownership, "with the consent of the true owner," has to be in some way disproved. But in the case before your Lordships, that was actually done by the company's engagement under the deed in the respondents' possession, which could not have been done by any mere notice. This being the respondents' position, what is that of the appellants? They

(6) 3 Russ. 1.

were content to trust to the statement of their transferor, that the certificates were "lost or mislaid"—(as Mr. Colladon adds)—that they "most likely had been mislaid with his private papers at home." What could be more easy, more obvious, than to require him to go at once and search for them among those papers? The appellants did no such thing. To obtain new certificates from the company, under article 35, if the old were lost, one of two alternatives was necessary—either (1) proof of the loss, satisfactory to the board; or (2) an indemnity, deemed by the board adequate. The appellants, passing over the first alternative—neither requiring themselves from the transferor, nor offering to furnish to the directors of the company, any evidence of the alleged loss—went straight to the other, that of indemnity. That negotiation came to nothing: the indemnity offered was not accepted; indeed, it never came for consideration before the board of directors. But the fact remains, that what the appellants proposed to give was not evidence of loss of the certificates, but indemnity, if it should turn out (as the fact was) that they were in the hands of some one to whom the company, if it registered the shares without their production, might be liable.

I am of opinion, that there is nothing here to displace the original equitable priority of the respondents: and I move your Lordships to dismiss this appeal, with costs.

The other presiding Law Lords reached the same conclusion.

Liability of Transferee of Shares to Indemnify Transferor. Trustees.

LEVI v. AYERS.

1878, 3 App. Cas. 842.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Action for indemnity in respect of liability on shares.

Sir Barnes Peacock said:—The equity of the plaintiff, if any, against the trustees must be founded upon these two propositions, or one of them, viz.: 1st. That the transferee of shares in a company formed under the Companies Act, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against

all liabilities in respect of them subsequent to the date of the transfer; 2nd. That a trustee whose name is on the register, though personally liable as a shareholder, is entitled to be indemnified by his *cestui que trust.*

These propositions, as general rules, are indisputable. Their application, however, and particularly that of the first, to the present case depends upon various considerations of greater or less nicety.

In what way can the trustees be said to have become the transferees of these shares, taking the beneficial interest thereof? Simply by having executed and acted under two deeds, in the nature of a *cessio bonorum*, for the benefit of creditors, which assigned that beneficial interest, together with all the other property of the insolvent debtors.

That the law makes a distinction between persons taking an assignment of shares or the beneficial interest therein by way of contract and under an ordinary deed, and the assignees of a bankrupt or insolvent who take his whole estate by operation of law, is clearly established. The reasons for the distinction are pointed out by Sir William Grant, in his judgment, in the case of *Wilkins* v. *Fry* (1), though the question in that particular case was whether the assignees of a bankrupt who had sold his leasehold property had a right, independently of positive stipulations, to require from their vendor an indemnity against the covenants in the lease. In *Turner* v. *Richardson* (2) and other cases, it was treated as settled law that assignees in bankruptcy are not bound to accept a *damnosa hæreditas*, and that they have consequently an option to accept or to repudiate property which is or may be injurious to the estate.

The substantial question, therefore, in this case is whether the trustees are to be treated as the assignees of shares under an ordinary deed, or as persons taking in the character and with only the right and liabilities of assignees under a bankruptcy or an insolvency.

It appears to their Lordships that in deciding this question, they ought to look to the substance rather than to the form of the transaction; to the nature of the functions undertaken by the trustees rather than to the machinery by which those functions were created.

* * * It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents, that the assignees, taking the property for division amongst his creditors, should be liable,

(1) 1 Mer. 244. (2) 7 East. 335.

either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency. The subject was fully considered by Sir William Grant, in the case of *Wilkins* v. *Fry* (1), above referred to.

Lien on Shares for Personal Debt of Shareholder to Company where Shares were Trust Investment.

NEW LONDON AND BRAZILIAN BANK v. BROCKLEBANK.

1882, L. R. 21 Ch. D. 302.

THE COURT OF APPEAL.

The plaintiff company was a limited company, and the 105th and 106th articles of association were as follows:—

105. "The company shall not be bound by or recognise any agreement to transfer or charge any share, or any equitable, contingent, future or partial interest, or other right in, to, or in respect of such share, except an absolute right thereto in the person from time to time registered as the holder thereof."

106. "The company shall have a first and paramount lien and charge available at law and in equity upon all the shares of any shareholder for all moneys owing to the company from him alone or jointly with any other person, and when a share is held by more persons than one, the company shall have a like lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone or jointly with any other person, and in any case whether such moneys shall be payable or not."

The defendants Brocklebank and Mee were registered as joint holders of 123 shares of £20 each in the company, and Mee was registered as sole holder of 10 shares. These shares were all acquired long prior to 1879.

Down to June, 1879, Mee was a partner in the firm of Francis Saunders & Co. In that month, the firm presented a petition for liquidation by arrangement, and a resolution for liquidation was

passed. At the commencement of the liquidation, the plaintiffs were the holders of two acceptances of the firm for £2,000 each, which had been dishonoured, and they commenced this action to enforce their lien for these sums on the 123 shares and the 10 shares.

Brocklebank and Mee, by their statement of defence, stated that they were the trustees of the marriage settlement of Mr. and Mrs. Brogden, which authorized the trustees to invest the trust funds on any of the securities therein mentioned, including the stocks, funds, shares, loan notes, debentures, mortgages, or securities of any corporation, company, or public body, municipal, commercial, or otherwise, in the United Kingdom. That the shares in question had been purchased with part of the trust funds, and were held upon the trusts of the settlement, and that neither of the defendants had any beneficial interest in any of the shares, but that they held them on the trusts of the settlement. They set up a counterclaim for payment of dividends on the shares.

The trustee in liquidation was made a party, but disclaimed all interest.

Bacon, V.-C., gave judgment for the plaintiff company.

Brocklebank and Mee appealed.

Jessel, M.R.:—This, to my mind, is a perfectly plain case. By its articles of association, the banking company had a lien or charge on shares standing either in a single name or in joint names for any debt due from any of the holders, either separately or jointly with any other person. The shares now in question were standing partly in the name of Mr. Mee alone, partly in the name of Mee and another, and Mee was indebted to the bank in a joint debt, that is, a debt owned by him, together with another person. The case is clearly within the terms of the articles of association. Mee acquired the shares under that contract, he is bound by it, and against him the charge is perfect. But it is said on behalf of the appellants that Mee was a trustee for others, that he bought these shares with other people's money, being duly authorized so to purchase them, and held them on their behalf, and that the debt to the company, having arisen since the purchase, must be postponed in equity to the equitable rights of the *cestuis que trust,* on the ground that the equitable charge, which is first in time, is first in right. The answer to that is, that the charge of the bank is first in right, and indeed first in time. The charge of the bank took effect as one of the terms on which the registration was made, it was this, "We will admit you, Mee, as a shareholder in this bank

on the terms that whenever you owe us any money, we shall have an equitable charge on these shares." That contract was perfect at the moment when the shares were registered, there is no possibility, therefore, of the title of *cestuis que trust* being prior. That alone would be conclusive, but there is another ground equally conclusive, which is this—the *cestui que trust* buys in the name of the trustee property subject to a charge in a given event, can that *cestui que trust* get the benefit of the purchase, and not comply with its terms? I put, in the course of the argument, an illustration which appears to me to apply to this case, suppose the *cestui que trust* authorized trustees to take the lease of a farm on the terms that the landlord should have an equitable charge on the stock and crops of the farm for the time being for his rent, could the *cestui que trust* say that he would keep the farm, and take the stock and crops, and not pay the landlord, that he could take the benefit of the trustees' purchase free from the obligation on which the purchase was made? It is plain that he could not, it would be the grossest injustice to enable the tenant to exclude the landlord, to whom he gave no notice of the trust, by buying, not with his own money, but with the trust money with the assent of the *cestui que trust*. A decision in favour of the company does not at all contravene the doctrines of equity as to priority of equitable rights. This appeal, therefore, fails, and must be dismissed. It must not be assumed from anything I have said that because the trustees were authorized to invest in the shares of any company, they were justified in investing in the shares of a company whose articles contained provisions such as that now under consideration.

Lindley, L.J., and Holker, L.J., expressed the same view.

Lien on Shares. Moneys Becoming Due from Shareholder to Company after Notice to Company of Pledge to Bank. Notice of Trust. No Exemption Clause in Favor of Company as to Notice of Interest in Third Party.

THE BRADFORD BANKING COMPANY, LIMITED v. HENRY BRIGGS, SON & CO., LTD.

1886, 12 App. Cas. 29.

THE HOUSE OF LORDS.

Appeal from a decision of the Court of Appeal reversing a judgment of Field, J. A statement of facts is set forth in the judgment of Lord Blackburn.

Lord Halsbury, L.C.:—My Lords, I have had an opportunity of considering the reasons of the noble and learned Lord (Lord Blackburn) for the view he entertains, and in which I concur, that the judgment of the Court of Appeal should be reversed and the judgment of Field, J., restored. Nor should I desire to add anything to what he is about to urge, but that I see some reference to the words of a noble and learned Lord (Lord Selborne) with respect to the proposition that sec. 30 of the Companies Act renders it impossible for any company to be affected by notice of any trust, expressed, implied, or constructive.

I was a party to the judgment of your Lordships' House in the case to which reference is made (1), and I certainly never imagined myself to be agreeing to a decision which could establish any such proposition, and the noble and learned Lord, in whose words I have expressed my concurrence, gave no such reasons for his judgment. No such proposition was necessary for the decision of the case, and I wish to guard myself on the present occasion from being supposed to have so held.

The words occur not only in the Companies Act, sec. 30, but also in sec. 83 of the Land Transfer Act, 1875, and if what is suggested as the true interpretation of those words were to be so determined by your Lordships' House, it would come to this, that whenever the conduct of the parties to a dealing in land had been such that a Court of Equity would imply a trust, the operation of those words would be such as to shield the person registering

(1) 11 App. Cas. 20.

from the jurisdiction of a Court of Equity in respect of the lands so registered, though but for that section he would have been held by a Court of Equity to be merely a trustee. So startling a result ought not to be arrived at without direct decision and, as I have already said, I do not understand your Lordships ever to have decided it.

I concur, however, in the conclusion to which the noble and learned Lord has arrived and in the reasons upon which it is founded.

Lord Blackburn:—My Lords, this is an appeal against the following order of the Court of Appeal (England), dated the 14th of July, 1885:—"Upon motion this day made unto this Court by counsel for the defendants, Henry Briggs, Son & Co., Limited, by way of appeal from the judgment dated the 13th of March, 1885, and upon hearing counsel for the plaintiffs, and upon reading the said judgment, this Court doth order that the said judgment, dated the 13th of March, 1885, be reversed. And it is ordered and adjudged that this action do stand dismissed as against the defendants, Henry Briggs, Son & Co., Limited. And it is ordered that the plaintiffs, the Bradford Banking Company, Limited, do pay to the defendants, Henry Briggs, Son & Co., Limited, their costs of this action and occasioned by the said appeal, such costs to be taxed by the taxing master."

In order to understand the points of law involved in this appeal and the judgment of the 13th of March, 1885, a little statement is necessary.

The respondent company is a trading company limited by shares and incorporated under the Companies Act, 1862, for the purpose of carrying on the business of a colliery. It has articles of association which exclude the regulations contained in the First Schedule, Table A, to the Companies Act, 1862, and those articles of association were duly registered.

The Companies Act, 1862, sec. 16, enacts that when registered, the articles shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations in such articles.

The only one of the articles of association which I think it material to notice is the 103rd article, which is as follows:—"The company shall have a first and permanent lien and charge,

available at law and in equity, upon every share of every person who is the holder or one of several joint holders thereof, for all debts due from him, either alone or jointly with any other person, whether a shareholder or not in the company."

John Faint Easby, a coal merchant, became a proprietor of a number of shares in the respondent company, and obtained certificates for them. This property in the shares was, by virtue of the 16th section of the Act already quoted, I think, bound to the company as much as if he had (at the time he became holder of these shares) executed a covenant to the company in the same terms as article 103, but I do not think it was bound any further.

John Faint Easby filed a petition for liquidation on the 31st of December, 1883, being then indebted to the company. He had been a customer of the respondent company, and owed them a considerable sum at that date. He still continued the registered holder of the shares, and, if there had been no more in the case, it is not now at least disputed that the respondent company would have had a first lien on the shares. But Easby was a customer of the Bradford Banking Company, the now appellants, and in November, 1879, he deposited, amongst other things, the certificates of 120 shares in the respondent company, and the appellant company, by their solicitors, sent in duplicate the following notice:—"For and on behalf of the Bradford Banking Company, we do hereby give you notice that John Faint Easby, of Albert Place, Bradford, in the county of York, coal merchant, has deposited with the said company certificates for sixty £15 shares, Nos. 6629 to 6678, both inclusive, No. 7790 and Nos. 10,998 to 11,006, both inclusive, in Henry Briggs, Son & Co., Limited, also for sixty B shares, Nos. 1908 to 1967, both inclusive, in the same company, for securing the repayment of all the moneys or balances due or to become due to the said company from the said John Faint Easby, either alone or together with any other person or persons.—Dated the 6th day of November, 1879.—Gardiner and Jeffery, solicitors or agents for the said banking company.—Mr. John Henry Phillips, secretary to Henry Briggs, Son & Co., Limited, Whitwood and Methley Collieries, near Leeds."—Endorsement.—"Notice of the above-mentioned deposit lodged with Henry Briggs, Son & Co., Limited, this 15th day of November, 1879.—John H. Phillips, Secretary." One copy was returned with the indorsement on it; the other was retained by the secretary.

On the 20th of June, 1881, there was a further deposit of certificates, and these letters were sent:—"Sir,—20th June, 1881.—We hereby give you notice that Mr. John Faint Easby, of Oakroyd

Terrace, Bradford, coal merchant, has deposited with this company the following certificates, viz. (stating the numbers), in Henry Briggs, Son & Co., Limited, for securing the repayment of all moneys or balances due or to become due to us from him either alone or together with any other person or persons.—We are, Sir, your obedient servants, Joseph Crofts, sub-manager.—Please own receipt.—The Secretary, H. Briggs, Son & Co., Limited." "Whitwood Collieries, Normanton.—22nd June, 1881.—Sir, We are in receipt of your favour of the 20th instant, informing us that Mr. J. F. Easby has deposited with your bank certain certificates of shares in our company. We think it right to inform you that Mr. Easby is indebted to us, and that, under a clause of our articles of association we have a first and permanent lien upon all shares held by him.—Yours faithfully, John H. Phillips, Secretary.—The Manager, the Bradford Banking Company, Limited."

I think it would only complicate the matter to make in detail a similar statement as to the shares of William Fletcher.

The action was brought by the Bradford Banking Company claiming to have: 1. An account taken of what is due to them for principal, interest, and costs on their said securities, and to have their said securities realized by foreclosure and sale. 2. A declaration that their said securities have priority over all lien (if any) of the defendant company (the respondents) on the said shares created by their articles of association or otherwise.

The points of law were argued on the admissions in the pleadings, and on admissions made by counsel at the bar and embodied in the judgment of Field, J. The important admission, as far as regards Easby's shares, was that the account of John Faint Easby with the plaintiffs was closed in June 1881 (which involves an admission that all the advances in respect of which the plaintiffs sue were made before that date), and that all moneys owing by him to the defendants when the said account was so closed have since been paid. This at once raised the question whether the plaintiffs, as pledgees of Easby's interest in the shares, had priority for advances over debts which were contracted after notice of that pledge, though the lien was claimed by virtue of a contract made at the very time when the shares were first acquired by Easby, and consequently before the shares could be pledged by Easby to the appellants or any one else.

Field, J., thought the point concluded by the decision of this House in *Hopkinson* v. *Rolt* (1). It was argued that the terms

(1) 9 H. L. C. 514.

of the article 103 here prevented the application of that case. Field, J., did not put such a construction on the article. He says, "The company had a first charge upon the shares for any debts which should become due to them by the shareholder, but after that charge had been created, and before any of the debts now sought to be recovered by the company were incurred, the shareholder exercised his right of borrowing money upon the shares by means of an absolute charge upon them to the bank. The company had notice of that charge, and I think that from that time they had no power to make advances to the shareholders, so as to rank in priority to the debts due to the bank."

The Master of the Rolls (Lord Esher) and Baggallay, L.J., both express an opinion that inasmuch as the article 103 stipulated for a "first and permanent" lien, the decision of this House in *Hopkinson* v. *Rolt* (1) did not apply. Fry, L.J., did not go so far as to dissent from their opinion, but he certainly did not rest his judgment on that ground.

As I understand it, the principle of *Hopkinson* v. *Rolt* (1) is explained by Lord Campbell then Lord Chancellor, and it is this:—The owner of property does not, by making a pledge or mortgage of it, cease to be owner of it any further than is necessary to give effect to the security which he has thus created. And if the security is, as that in *Hopkinson* v. *Rolt* (1) was, a security for present and also for future advances, the pledgee or mortgagee, though not bound to make fresh advances, may, if he pleases, do so, and will, if the property at the time of the further advance remains that of the pledgor, have the security of that property.

But the mortgagor (unless there is something to make it against conscience in him to do so) may cease to take further advances from the first mortgagee, and borrow money from any one else ready to lend it on the security of that property remaining in him not already pledged to the first, subject to the priority of the first pledgee for advances made or begun to be made. The first mortgagee is entitled to act on the supposition that the pledgor who was owner of the whole property when he executed the first mortgage continued so, and that there has been no such second mortgage or pledge until he has notice of something to shew him that there has been such a second mortgage, but as soon as he is aware that the property on which he is entitled to rely has ceased so far to belong to the debtor, he cannot make a new advance in priority to that of which he has notice. As

(1) 9 H. L. C. 534-536.

Lord Campbell says, "the hardship upon the bankers from the view of the subject at once vanishes, when we consider that the security of the first mortgage is not impaired without notice of a second." It seems to me to depend entirely on what I cannot but think a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor.

Lord Cranworth thought that it had been established for a long time by the Courts of Equity that, under such circumstances, the general rule of equity was to postpone the second mortgage to advances made by the first mortgagee after notice of the second, if the original mortgage was prior in time to the second. He says, I think very truly, that if such was the established and known rule in equity, there could be no injustice in enforcing it. But the majority of this House held that such was not the established and known rule of equity. And I think it was not questioned by any one that the decision of the majority in *Hopkinson* v. *Rolt* (1) finally decided that point.

I cannot assent to what I understand to be the reasoning of the Master of the Rolls and Baggallay, L.J., in the construction of the 103rd article. I do not see that the words "first and permanent lien" differ from "lien," or at least that they make it in any way unconscientious or unjust in the owner of the property pledged, to obtain a further advance from a second pledgee who knows of the first pledge, though that second pledgee, for his own sake, must take care to give notice of his security to the first pledgee.

The Master of the Rolls says that the plaintiffs, when the shares were deposited with them, know, or at least ought to have known, what the articles were, and I so far agree with him. But he adds, "that is to say, the plaintiffs made their advances with the knowledge of this, that those who deposited the shares with them had contracted with the company that, notwithstanding any deposit of the shares with the plaintiffs, the company should have in equity the first lien and charge." I cannot agree that such is the true construction of article 103.

This brings me to the second point on which all three Judges in the Court of Appeal agreed. The Companies Act, 1862, sec. 30, is in the following terms:—"No notice of any trust, expressed, implied, or constructive, shall be entered on the register or be

receivable by the registrar in the case of companies under this Act and registered in England or Ireland." The effect of that section was much discussed in a case of *Société Générale de Paris* v. *Tramways Union Company* (2) decided by the Court of Appeal on the 18th of December, 1884. And of that decision the Judges in the present case were aware. It was affirmed in this House under the name *Société Générale de Paris* v. *Walker* (3), not entirely for the same reasons, on the 17th of December, 1885. The Judges in the present case deciding, as they did, on the 14th of July, 1885, could not know of that latter decision.

I think that in order to bring this case within the principle of *Hopkinson* v. *Rolt* (1), it is not necessary to establish any trust as against the company. It is, I think, enough to shew that the company, a trading one, had by its agents who managed its trading transactions such knowledge that their customer Easby had ceased to be the owner of the shares as would have made it unjust to allow him credit on the faith of that property, which had once been his, but which he had parted with before they were asked to allow him to incur the debt for which they now seek priority.

The legislature are competent to enact that a trading company of this sort should have the right to disregard the ordinary rules of justice, and charge what they knew was one man's property with another man's debt, if only that property consisted of shares in the company, but I do not think it possible to construe sec. 30 as an enactment to that effect. Lord Selborne in *Société Générale de Paris* v. *Walker* (3), said, "I think that according to the true and proper construction of the Companies Act, 1862, and of the articles of this company, there was no obligation upon this company to accept, or to preserve any record of, notices of equitable interests or trusts if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust." I do not think it necessary to express any opinion as to this, for I do not think that the appellants in this case seek to affect the respondents with a trust; they seek no more than to affect them, in their capacity of traders, with knowledge of their (the appellants') interest.

I think, therefore, that the order appealed against was wrong, and should be reversed; and that the judgment of the 13th of March, 1885, should be restored; and that the respondents should

(2) 14 Q. B. D. 424. (3) 11 App. Cas. 20.

pay to the appellants their costs, both in the Court of Appeal and in this House.

Lord Fitzgerald gave reasons for the same result.

Note.—The case of Societé Generale de Paris v. *Walker, L. R. 11 A. C. 20, is quoted supra, p. 193. Observe the fact that there was an exemption clause in that case which differentiates it from the Bradford case.*

Ultra Vires. Restriction of Companies to Expressed Powers and Objects. Ultra Vires Acts of Directors, Ratification.

ASHBURY RAILWAY CARRIAGE AND IRON COMPANY (LIMITED) v. RICHE.

1875, L. R. 7 H. L. 655.

THE HOUSE OF LORDS.

The judgment of the learned Lords reversed that of the Exchequer Chamber.

The main facts and the principles of the decision may be gathered from the judgment of Lord Selborne.

Lord Selborne:—My Lords, the action in this case is brought upon a contract not directly or indirectly to execute any works, but to find capital for a foreign railway company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your Lordships, and all the Judges in the Courts below, appear to be, so far, agreed.

But this, in my judgment, is really decisive of the whole case. I only repeat what Lord Cranworth, in *Hawkes* v. *Eastern Counties Railway Company* (1), (when moving the judgment of this House), stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the Companies Act of 1862, appear to me

(1) 5 H. L. C. 331.

to be statutory corporations within this principle. The memorandum of association is under that Act their fundamental, and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in the memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void, and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators. It was so held in the case of the *East Anglian Railway Company* (2), and in the other cases upon Railway Acts, which cases were approved by this House in *Hawkes' Case* (3), and I am unable to see any distinction for this purpose between statutory corporations under Railway Acts, and statutory corporations under the Joint Stock Companies Act of 1862.

The view of the three Judges who in the Court of Exchequer Chamber were for affirmance, was (as I understand it), that all contracts whatever (not expressly or by necessary implication prohibited), are, *prima facie,* within the powers of all these companies merely because they are corporations, but that, inasmuch as the common seal must be affixed to their deeds by some agents having a delegated power, and as the general powers delegated to the directors and general meetings are only for the purposes expressed in the memorandum and articles of association, their agency to seal a contract going beyond those purposes cannot be presumed, unless it is made manifest by proof of the consent of every individual shareholder. With this view I cannot agree. I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do.

This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice Blackburn's judgment), that, where there could be no mandate, there cannot be any ratification;

(2) 11 C. B. 775; 21 L. J. (C.P.) 23. (3) 5 H. L. C. 331.

and that the assent of all shareholders can make no difference when a stranger to the corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation which the law says cannot and shall not be so.

If, however, this contract (though contrary to the law of the association, and not within the powers either of the directors or of a general meeting) could have been susceptible of confirmation or ratification by the universal consent of all the shareholders, I should have been of opinion that there was here no evidence whatever to go to a jury of any such confirmation or ratification. What was relied upon consists entirely of resolutions passed at certain general meetings of the shareholders, and a deed executed pursuant to those resolutions. But (assuming these to be acts which might properly have been construed as acts of adoption or ratification), there is no evidence that they were ever communicated to any shareholder who was not present at those meetings, either by notice beforehand, or afterwards. The notices under which these meetings were convened contained nothing from which any shareholder could be led to suppose that it was in contemplation to enter into or adopt, on the part of the company, any contract or arrangement in excess of the ordinary powers of the company, as represented by the shareholders assembled at a duly constituted general meeting. There is no obligation upon any shareholder receiving such notices, either to attend the meetings or to make inquiries as to what is proposed to be done at them, in order to protect himself from being bound by acts or contracts *ultra vires* of any general meeting. He will, of course, be bound by all that the general meetings can do, as to the matters mentioned in the notices, within their powers; but he cannot, in his absence and without his knowledge, be taken to consent that they shall bind him by any resolutions or acts in excess of those powers, whether such acts or resolutions do or do not relate to the particular business for the transaction of which those meetings were called together.

As to the construction placed by the majority of the Judges upon the resolutions and deed, which in this case they held to establish ratification, I only wish to guard myself against being supposed to assent to the proposition that a deed executed between the directors and their shareholders, which was not meant to be, and which, as between the parties to it, was not, a ratification by the company of the agency of the directors in transactions otherwise unauthorized, and which was never acted upon so as to alter

or affect the position of the Messrs. Riche, could operate in their favour as a ratification of that agency.

Judgment of the Court of Exchequer Chamber reversed, and judgment entered for defendants.

Ultra Vires. Express Limitation of Borrowing Powers.

BARONESS WENLOCK v. RIVER DEE COMPANY.

L. R. 36 Ch. D. 674 (note).
1885 L. R. 10 A. C. 354.

THE COURT OF APPEAL AND THE HOUSE OF LORDS.

The facts are sufficiently set out in the judgment.

Lord Esher, M.R.:—In this case Lord Wenlock's executors have brought an action against the River Dee Company in order to recover a very large sum with interest upon a covenant contained in a mortgage deed, and it is undoubted that Lord Wenlock did advance a very large sum upon a mortgage which was given to him under the seal of the company and upon a contract which those who in fact made it with him represented to be a contract with the company. The defence is, that although the money was in fact advanced upon such representation, namely, that it was money to be advanced to the company, and although the mortgage and the covenant are a mortgage and a covenant under the seal of the company, yet that the company is not liable to this action substantially in covenant, because it is alleged by the company that those who made that covenant and who made that mortgage had no authority to bind the company by the use of the seal for that purpose. If that defence be a valid one there can be no doubt about the hardship thereby inflicted upon Lord Wenlock, and in this case a hardship much greater than usual, because this is not simply the case of directors either wilfully or inadvertently doing that which, if it were upheld, would bind a number of shareholders who are not directors, but actually in this case if this covenant and this mortgage cannot be upheld it is a covenant and a mortgage made by people who are said to be the agents of the company, but who in truth and in fact are the only persons interested in

the company. It is as if all the shareholders of the company were to make this representation and obtain money and then put forward the defence when an action is brought against the company, that although they, the shareholders, had misled the person into advancing his money, nevertheless the company is not liable. If this action were really the defence of those who induced Lord Wenlock to advance his money upon the representation made by them—if this action is defended in the name of the company by them—I hesitate to express the feeling which I have as to such conduct; but if this action is really defended, although in the name of the company, on behalf of the Credit Foncier, I can pass no opinion upon whether it is a just or righteous defence or not, because I know nothing of the circumstances under which they became the persons having the command of this defence. The question of whether those who actually made the arrangement with Lord Wenlock had the authority of the company seems to me to depend upon what is the proper construction of the Act of Parliament which incorporated the company.

The origin of this company has some peculiarity, but I confess that to my mind that which was partly relied on as differing this case from others is not a subject which can be relied upon except to a small extent. It is said that the undertaking to carry out which the company was formed was originally the undertaking of an individual, and that the fact of the company being formed to take over his undertaking ought to induce us to consider that the company was not originated as it were by the Act of Parliament, and could gather to itself any of the attributes which belonged to the individual. I cannot adopt that view. Whether a company is formed by statute of individuals who have no peculiar character or position, or is formed of people to carry on an undertaking which private persons were carrying on before, seems to me to make no difference in the construction of the documents which form the company. It seems to me that we must look at the Act of Parliament which formed the company, and that the only effect which can be given to the fact of an individual having been the undertaker is to see whether in the Act of Parliament there is by reference brought into the Act and therefore into the powers of the company anything which was a power of the individual. But that is in other words only bringing those powers by reference into the statute and reading the statute as if they had been written in it.

The question raised upon that statute is, whether the company had by it a power to borrow money either on covenant or on a

mortgage containing the covenant. On the one side it was argued that where a company or corporation is formed by a statute, then from the mere fact of its being made a corporation it has prima facie a right to borrow money to any extent just as an individual might, and that you ought not to cut down that prima facie power unless you can find something either express or by necessary implication in the statute which diminishes that power. On the other side it was argued that when a corporation is formed by statute or otherwise the corporation has prima facie no power whatever to borrow, and that you cannot assert that it has such a power unless you find something express in the statute by which it is formed, or something which by necessary implication gives it the power. I myself incline to think that neither of those arguments is valid. If the one is more valid than the other I incline rather to the latter of the two, but it seems to me that neither of them is valid, and that when you have to consider the borrowing powers of a corporation which has been formed by statute or otherwise, the matter depends entirely upon what is the construction of the statute or document, and you have to see whether there is power given to the company either expressly or by reasonable implication. If a company or corporation is formed for the purpose of a particular undertaking, which undertaking it is obvious cannot be carried out without the expenditure of money, and if by the statute or document no means are given to the company which will give them money in hand, or will give them express power to raise money, it seems to me that a reasonable implication would necessarily arise that they must have power to borrow, because otherwise the statute which created them is a futile document, it would pretend to give them powers to do things, but would give them no means of doing those things. Therefore if there were no powers in this original statute, or in what has been called the original statute, by which this company could have money in hand, or by or under which they could have the means of doing what the statute says they are formed to do, I should have inferred that they had power to borrow, and in that case I could see nothing to limit that power to borrow. It must have been the same as a power to an individual, or at all events it must have gone to the full extent of what could have been reasonably necessary for the purpose of carrying on the undertaking. But where in the statute or other document which forms the company you find that means are put into the hands of the company—that is, either by raising capital or by calling up more capital, or by a limited power of borrowing, or by any other way, as by a power to sell lands—

which may be within reason sufficient for the purpose of enabling them to carry on the undertaking, then it seems to me that no Court can measure whether those means will in the event be absolutely sufficient or not. Those means being put in their hands you cannot infer that they have at the same time the power to borrow. Under these original statutes this company being formed for a particular purpose first of all had a capital given to it, and, secondly, it had power to raise money by calls, that is really by the issue of new shares to an extent of 20 per cent. beyond that capital. Inasmuch as these lands were given to the company as a reward for what they were to do, and were given to them and their successors in fee (although these lands if they were sold by them would nevertheless be subject in the hands of a purchaser as well as in their hands to certain rights of the Commissioners if the navigation were not properly made, or not properly kept up) to a great extent, more or less, this company had the power of selling lands and bringing the proceeds of those sales into the company, so that those proceeds would be further capital in their hands for the purpose of carrying on the undertaking. Therefore this company had means more or less in its hands, and applying to this company the proposition laid down by the Lord Chancellor in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, (1), in which he says: "There is also no doubt, that where there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes" it seems to me that you cannot say that it is necessarily incident to the purposes of this company that they should have had by those former Acts a power of borrowing, either to an unlimited extent or, at all events, to the full extent of anything they might have required for the purpose of the company. I think, therefore, that you cannot in the first Act or in any of the subsequent Acts infer any power in this company to borrow money either upon covenant or loan, or upon mortgage containing a covenant. But then we must see whether the company has power to borrow to any extent. It was substantially admitted that this company has power to borrow upon mortgage containing a covenant to the extent of £25,000. After hearing what Mr. Davey said I do not think it necessary to inquire further into the argument that even though they had power to mortgage they had not power to borrow money upon a covenant in a deed of mortgage.

(1) 22 Ch. D. 70.

It seems to me that they had and therefore to the extent of £25,000, but to that extent only, those who were acting for this company had power to borrow on mortgage containing a covenant, and that being so, they having borrowed money from Lord Wenlock, although they exceeded their authority when they borrowed more than £25,000, to the extent of £25,000 they did not exceed their authority, and the company is bound. Therefore Lord Wenlock, taking this to be an action on covenant, is entitled upon that covenant, and in respect of that covenant, to recover to the extent of £25,000, and the proper interest calculated in the ordinary way. But when we have to deal with the money which was obtained from Lord Wenlock on this covenant given in the name of the company and under the seal of the company, but beyond the authority of those who so borrowed the money in the name of the company, it is clear that the plaintiffs, as to that, cannot recover by action on the covenant, because the covenant is an unauthorized covenant beyond the extent of £25,000. The plaintiffs may recover in respect of some other right, but there is no right which can bind the company at law according to the common law of England, therefore their right, if any, is an equitable right. I shall not pretend to go further with regard to the equitable right than to say that if any of the money borrowed in this way from Lord Wenlock has been expended in paying proper debts of the company then, although those who received the money from Lord Wenlock were not authorized to bind the company, yet Lord Wenlock's representatives may in equity recover from the company so much of that money as was expended in paying debts of the company. It was not proved at the trial, and has not yet been proved, whether any part of the money beyond the £25,000 was so expended, but inasmuch as under the Judicature Acts so much might have been recovered in this action without bringing in any other parties, it seems to me that that evidence ought to have been given at the trial, but as it was not given at the trial, we have the right to order that it should be inquired into, and if it can be shewn upon such an inquiry that any such debts were paid by money borrowed from Lord Wenlock beyond the £25,000, the plaintiffs are entitled to so much of Lord Wenlock's money beyond the £25,000 as has been expended in those debts. In other words, that as to the £25,000 the plaintiffs would stand on their own right at law, and as to the debts which had been paid with Lord Wenlock's money they will stand as it were in the rights of the creditors who have been thus paid with Lord Wenlock's money.

Owing to very many peculiarities in this case several other equities have been suggested as equities to which Lord Wenlock was entitled, both as against the company and as against what may be called the shares, and as against individuals who may be brought in. We have listened to this case with all the attention we could, and I must say, so far as I myself am concerned, with the utmost anxiety to enforce, if I could according to law, Lord Wenlock's rights as against this company; this company being assumed by me for that purpose to be in truth, although it is not in contemplation of law, the very people who borrowed this money from Lord Wenlock, and who are setting up this defence. I only feel myself bound not to give way to any feeling so far as to do that which I cannot see is according to law. But I should have been anxious if possible to find that I could according to law have made this company repay Lord Wenlock, assuming, as I say, this company to be the people who borrowed the money from him in the way in which it was done. But with regard to these other suggested equities it might well have been that this Court should have exercised this power of bringing in the other parties, and of ordering further inquiries to be made, which might raise the question of whether the suggested equities could be upheld or not. I gather, however, from Mr. Rigby that he, with all his great experience, seemed rather to think that it would be safer for his clients not to proceed in that way, but to proceed by means of a new action, as his clients may be advised, either against the company or against other individuals, or against the company and other individuals, and he thinks it safer for his clients that we should give a judgment as between Lord Wenlock and the company alone, without the presence of other parties, reserving to him the right, without prejudice by this judgment, to consider whether his clients will bring an action either against the company alone or against other individuals alone, or against the company and other individuals, in respect of any other equities than those which are dealt with in this judgment. Therefore it seems to me that it is better for us to give the judgment which I for my part have now disclosed as the judgment which I am prepared to give.

COTTON, L.J., delivered judgment with a like result.

BOWEN, L.J.:—* * * I understand that our judgment is given in the first place upon the point raised by Mr. Davey, as to the construction of the statute, and I am of opinion with the remainder of the Court that the River Dee Company had no power to enter into the contract upon which they were sued. Beyond that, we

decide by our judgment that the plaintiffs are entitled to the equitable doctrine set forth in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), and we further reserve them all rights they may have, if any, to any equities they may establish outside that. The only matter upon which I propose to add any words is the question of law relating to the construction of the statute and the suggested power of the River Dee Company to enter into the contracts sued upon. The contracts sued upon are covenants for the repayment of the money purported to be secured by mortgage of the company's lands. The company was incorporated by the Act of 14 Geo. II., and the sole question—at least I think the sole question—is whether under that Act the corporation was clothed with the power of borrowing money and binding itself to repay the money; or if it was so clothed, whether such powers have been taken away by the later Acts.

Now, Mr. Rigby has presented for our consideration this sort of canon of construction of the statute. He said that when there is a statute which incorporates a company, you ought if you want to know whether the company can borrow money, to approach the statute assuming that the company can borrow money, unless the power is taken away expressly or by implication. I confess that I do not think that that is the true canon of construction, though I admit that far greater men have appeared to think it was. Of course one can only go by the light of one's own reason, and I propose to consider these statutes from a slightly different point of view, although I do not think my view makes very much difference. I wish, however, to explain the way in which I travel towards the consideration of them.

At common law a corporation created by the King's charter has, *prima facie*, and has been known to have ever since *Sutton's Hospital Case* (2), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and

(2) 10 Rep. 13.

I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away, is, I think, to travel on a wrong line of thought. What you have to do is to find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify it under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had. There are two questions, first whether a statutory corporation can borrow, and, secondly, whether if it cannot, its professed acts of borrowing can be ratified by consent of all the members of the corporation. Now, assuming that it is not a creature created with borrowing power, it is obvious that no amount of ratification by the individual members can make good an act which cannot be done; and therefore the same legal result is arrived at, if you consider the case from that point of view, as if you said that the shareholders were attempting to do an act which was prohibited. The real truth is, they are trying to ratify what cannot be ratified, because they are trying to ratify an act which the corporation is not in any view clothed with capacity to do. I therefore approach this case with a desire to find out what is this creature. Was it meant to borrow or was it not meant to borrow?

Before I go to the statutes I should like to add that it seems to me that the right test of construction, at all events with regard to

this contract of Lord Wenlock's, is laid down by the Lord Chancellor in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.*, (1). He says: "There is also no doubt, that where there is not an express prohibition against borrowing in the case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes." That seems to me to be putting into a nutshell and into very clear language exactly the test which would follow the course of thought I have been pursuing, and that it is the test which we must apply here. Applying it (I am not going through the history of the company or through the history of the statutes again), I agree with what the Master of the Rolls and Lord Justice Cotton have said * * * *

IN THE HOUSE OF LORDS.

The foregoing decision was affirmed—Lord Watson at p. 362 of L. R. 10 A. C. is reported thus: "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions. That appears to me to be the principle recognised by this House in *Ashbury Company* v. *Riche* (3), and in *Attorney-General* v. *Great Eastern Railway Company* (5).

Affirmed on appeal.

In *Great North-West Central Railway Company* v. *Charlebois*, 1899 A. C. 114, the question arose of the validity of a consent judgment upon a contract *ultra vires*. Lord Hobhouse in expressing the view of the Judicial Committee, said: "Of course, those Judges who think that the contract though improper was not *ultra vires*, have no difficulty in holding that the judgment is binding, whether by way of ratification or by its own force. But the difficulty is to reconcile an opinion that the contract is *ultra vires* with an opinion that a judgment obtained as this was is a binding judgment. The authorities referred to by the Supreme Court do not relate to contracts *ultra vires*. It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in Court like any other disputed matter."

(1) 22 Ch. D. 70. (3) Law Rep. 7 H. L. 653.
(5) 5 App. Cas. 473.

Ultra Vires Interference with Capital Fund—Reduction by Purchase of Company's Own Shares.

TREVOR v. WHITWORTH.

1887, L. R. 12 A. C. 409.

THE HOUSE OF LORDS.

A limited company was incorporated under the Joint Stock Companies Acts with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business, and any other business and transactions with the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorized the company to purchase its own shares. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and not wholly paid for.

Lord Herschell, L.C.:—My Lords, three questions are raised by this appeal: first, whether certain shares in James Schofield & Sons, Limited, were purchased by G. W. Schofield on his own account, or as agent for the company; secondly, whether, assuming that they were purchased for the company, and that the company had power to buy its own shares, the purchase had taken place in accordance with the articles of association; and thirdly, whether the company had power to purchase the shares.

James Schofield & Sons, Limited, was incorporated under the Companies Acts on the 31st of May, 1865, with a capital of £150,000 in 15,000 shares of £10 each. At an extraordinary general meeting of shareholders of the company on the 6th of May, 1884, it was resolved that the company should be wound up voluntarily, and on the 15th May following it was ordered by the Vice-Chancellor of the County Palatine that the voluntary winding-up should be continued under the supervision of the Court.

By an affidavit filed on the 1st of October, 1884, the respondents claimed from the company in the winding-up £2,873 12s. A summons was taken out by the appellants for the purpose of determining whether this claim ought to be allowed. Upon the hearing of this summons the claim was rejected by the Vice-Chancellor, but, upon appeal, this decision was reversed.

On the 1st of May, 1880, G. W. Schofield bought from the respondents, who were the executors of Robert Whitworth, a deceased shareholder, 533 shares in the company (twenty-eight fully paid up, 500 with £6 paid, and five with £5 paid), for the price of £3,305, the purchase-money to be paid within three years then next, at such time as the buyers should appoint, and interest at 5 per cent. to be paid by the buyers until completion. Interest was accordingly paid in the meantime, and on the 3rd of May, 1883, a transfer of the shares was executed by the vendors and G. W. Schofield.

On the 5th of May a receipt was given to G. W. Schofield for the sum of £3,305 for shares bought. But £505 only having been in fact paid, a promissory note was on the same day given to the appellants for £2,800 "deposited on loan at 5 per cent. per annum, interest from date." This was signed "for J. Schofield & Sons, Limited. G. W. Schofield, director."

The first question is, whether this transaction was entered into by G. W. Schofield on his own account, or as agent for the company. If the former, it is clear that Schofield was guilty of a gross fraud. Upon a review of the evidence I see no ground for coming to such a conclusion. I think the purchase of the shares was in fact made by him on behalf of the company.

The question whether, assuming the company had power to purchase its own shares, the purchase was effected in accordance with the articles of the company, is one of much greater difficulty. The article empowering the company to purchase its shares is as follows: "Article 179. Any share may be purchased by the company from any person willing to sell it, at such price, not exceeding the then marketable value thereof, as the board think reasonable." Now there is not the slightest evidence that the directors ever considered, either at a formal meeting of the board or otherwise, the question whether these shares should be purchased. The utmost that can be said to be established is that the directors other than G. W. Schofield, who negotiated the purchase, knew that the respondents had come to see him upon the subject. But further, the only authority to buy was at such price not exceeding the then market value as the board should think reasonable. The par value of the shares was apparently given in this case, as in the case of the other purchases, as a matter of course, and I see no reason to believe that any judgment was exercised upon the point by the board.

But although I think it far from clear that even if it was competent for the company to purchase the shares, this transaction

can be supported, I do not intend to pronounce an opinion upon this point, because, in consequence of the view which I believe all your Lordships entertain upon another part of the case, it is unnecessary to do so.

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy it shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act, 1862, requires (section 8), that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which

(1) Law Rep. 7 H. L. 653.

the company proposes to be registered, divided into shares of a certain fixed amount; and provides (section 12), that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867, provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to shew how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4,142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might

now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sections 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. It it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof), is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the

purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognized by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerated from future liability those who have shewn themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield &c. Co.* (2): "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In *Teasdale's Case* (3), Lord Justice James said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of *Hope* v. *International Financial Society* (4), that learned Judge said: "I am reported to have said in *Teasdale's Case* (3), that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But, however, that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, viz., to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally

(2) 17 Ch. D. 76. (3) Law Rep. 9 Ch. 54.
(4) 4 Ch. D. 327, 336.

and to a small extent it may be said to diminish the capital." In the case which gave rise to those observations, a company having 150,000 shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from 100,000, and that such shares should not be reissued by the directors without the authority of a general meeting. The Court of Appeal, affirming Vice-Chancellor Bacon, held that this scheme was invalid. Lord Justice James said: "Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore, a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares, the shares are not cancelled, they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche* (5). That was only to be one transaction, but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that, therefore, was the intention of this resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of

(5) Law Rep. 7 H. L. 653.

Guinness v. *Land Corporation of Ireland* (2), Lord Justice Cotton, after referring to section 38 of the Companies Act, said: "From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion, it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned Judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that Court in the case of *In re Dronfield Silkstone Coal Company* (7). In that case disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March, 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up, and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than with that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase, and prior to the winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is *inchoate*, and the Court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Company* v. *Green* (8). In that case the learned Judges appear to have considered that the transaction amounted to a purchase of shares in the company, which was prohibited by its articles

(2) 22 Ch. D. 349, 375. (7) 17 Ch. D. 76.
(8) Law Rep. 7 C. P. 43.

of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *Ashbury Railway Carriage and Iron Company* v. *Riche* (5), that a transaction not within the scope of the memorandum is incapable of ratification.

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House, and do repay to the appellants any moneys and costs received from them.

The other learned Lords delivered judgment likewise.

Authorized Reduction of Capital.

BRITISH AND AMERICAN TRUSTEE AND FINANCE CORPORATION, LIMITED AND REDUCED v. JOHN COUPER.

L. R. 1894, A. C. 399.

THE HOUSE OF LORDS.

A company limited by shares had power under its articles to reduce its capital by paying off capital. The shares were divided into ordinary shares partly paid up, and founders' shares fully paid up. The company had carried on business both in England and the United States, but it being found impossible to do so in both countries with advantage it was determined that the company should cease to carry on business in the United States, that the American investments should be made over to the American shareholders, their shares being cancelled, and that the English shareholders should take the English assets, receiving an agreed sum by way of adjustment. This arrangement was carried out by special resolution providing that the capital should be reduced by paying off the shares (both ordinary and founders') held by the American shareholders (the capital represented thereby being in excess of the wants of the company), and that such shares and all liability thereon be wholly extinguished. The company presented a petition praying the Court to confirm the resolution. All the creditors were either paid or assented to the arrangement. The confirmation of the Court was opposed by one shareholder.

The Court of Appeal had held that the arrangement could not be confirmed.

In the House of Lords an opinion was expressed as follows, by

Lord Herschell, L.C.:—My Lords, the case was, in both Courts, supposed to be governed by the views expressed by the Court of Appeal in the case of the *Denver Hotel Company* (1), that a company could not reduce its capital by paying off some of its shareholders unless all shareholders of the same class were dealt with alike. The merits of the arrangement embodied in the resolution now in question were not entered into. The position assumed was that the Court had no power to confirm it as being *ultra vires*. This renders it necessary to consider carefully what are the powers conferred by the Companies Act, 1867, and the Amending Act of 1877.

By the earlier of these statutes, companies were for the first time empowered to reduce their capital. Section 9 provides that any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum as to reduce its capital; and by section 11 a company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and on the hearing of the petition the Court, if satisfied that every creditor entitled to object to the reduction has either been paid or been secured or consents, may make an order confirming the reduction.

In consequence of views indicated by the late Master of the Rolls, that the Act of 1867 did not sanction the return of unpaid capital, the Act of 1877 was passed. It was enacted by section 3 that "capital," as used in the Act of 1867, shall include paid-up capital, and the power to reduce capital conferred by that Act "shall include a power to pay off any capital which may be in excess of the wants of the company." To the terms of section 4 I shall have occasion to refer presently.

It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the Court to confirm the reduction, except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured.

Now, it can scarcely be denied that such a scheme as that under consideration, by which certain of the shareholders receive a part of the assets of the company equivalent to their shares

(1) [1893] 1 Ch. 495.

therein, such shares being then cancelled, is a mode of effecting a reduction of the capital of the company.

When the case of *Trevor* v. *Whitworth* (2), was before this House, my noble and learned friend Lord Macnaghten said (p. 437): "I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. Now, the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power to 'pay off any capital which may be in excess of the wants of the company,' and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital or 'the payment to any shareholder of any paid-up capital.' It follows that if the operation be effected by payment of capital to any one shareholder all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company."

I did not express myself so definitely on the point, but I said: "Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly by the Act of 1867, provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully worded provisions to shew how inconsistent with the very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be." And further on I said: "And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result."

(2) 12 App. Cas. 409, 437, 415.

There can be no doubt that the *ratio decidendi* in that case was in part, at least, this: that a company which paid away its assets for the purchase of its own shares did thereby reduce its capital, and that not in a manner authorized by the Legislature.

If, then, the scheme which the Court is asked to confirm be in fact one for reduction of capital, I am, with all deference, at a loss to understand how the Court in confirming it could be acting *ultra vires*, seeing that, as I have pointed out, the statute has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object. Indeed, the provisions of section 4 of the Act of 1877, recognize that a scheme may involve the payment to a shareholder of a part of the paid-up capital, for it enacts that where the reduction of capital by the company does not involve either the diminution of liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, the creditors of the company, unless otherwise directed by the Court, shall not be entitled to object or required to consent to the reduction.

In the case of the *Denver Hotel Company* (3), Lindley, L.J., in delivering the judgment of the Court, said: "If this transaction really was a purchase by the company of its own shares from one shareholder only, we are of opinion that the Court could not sanction it. The purchase by the company involves the possession by the company of sufficient assets to pay for the shares bought, and the capital represented by such shares would not be lost nor unrepresented by available assets. The capital may be in excess of the wants of the company within the words of section 3 of the Companies Act, 1877. But these words cannot, in our opinion, be construed so as to enable a company to prefer one shareholder to another of the same class as himself by buying up his shares, and we cannot regard Lord Macnaghten's judgment in *Trevor* v. *Whitworth* (1), as intimating that any such transaction is within the statute. His remarks were made to enforce his view that, apart from the Companies Act, 1867 and 1877, it is *ultra vires* of a limited company to buy its own shares, even if its memorandum and articles expressly authorize it to do so. But he was not contemplating preferring one shareholder to another of the same class as himself.

My Lords, if all the shareholders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder and cancelling the

(3) [1893] 1 Ch. 495. (1) 12 App. Cas. 400.

shares held by him. I cannot see anything in the Acts of 1867 and 1877, which would render it incumbent on the Court to refuse to confirm such a resolution, or which shews that it would be *ultra vires* to do so.

I do not see any danger in the conclusion that the Court has power to confirm such a scheme as that now in question, or any reason to doubt that this was the intention of the Legislature. The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect. The interests of the dissenting minority of the shareholders (if there be such) are properly safeguarded by this: that the decision of the majority can only prevail if it be confirmed by the Court. This is a complete answer to the argument, ably urged by Mr. Romer at the Bar, that if all the shareholders of the same class were not dealt with in precisely the same fashion, the interests of the minority might be unjustly sacrificed to those of the majority.

There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar, would be most narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it.

It was further argued that the scheme was not within the statutory powers of the company, inasmuch as these were confined to paying off "any capital which may be in excess of the wants of the company." I may observe that section 3 of the Act of 1877, which contains these words, only enacts that the power to reduce capital conferred by the Act of 1867 "shall include" that power. But even if this is to be regarded (which I am far from saying that it is), as a limitation of the power to reduce capital by paying off paid-up capital, I am of opinion that in view of the alterations intended in the method of carrying on the business of this corporation the case is one in which the reduction has been effected, because the capital is in excess of the requirements of the company.

Assuming that it is within the power of the Court to confirm such a scheme as the present, it was scarcely contended by the learned counsel who represented the respondent that there was

any ground for refusing to do so, or that it involved any result either unjust or inequitable; and indeed, in view of the evidence before the Court, it would not have been possible successfully to maintain such a contention.

For these reasons, I am of opinion that the judgment appealed from should be reversed, and that the special resolution should be confirmed, and I move your Lordships accordingly. Having regard to the fact that the term "reduced" has been used in describing the company for a very considerable time, I think that they may be allowed hereafter to discontinue that addition.

The other learned Lords addressed the House to the same effect.

Ultra Vires. Sale of Shares at Discount from Nominal Value.

THE OOREGUM GOLD MINING COMPANY OF INDIA, LIMITED v. GEORGE ROPER ET AL.

L. R. 1892, A. C. 125.

THE HOUSE OF LORDS.

The memorandum of association of a company registered under the Act of 1862 stated that the capital of the company was £125,000, divided into 125,000 shares of £1 each, and that the shares of which the original or increased capital might consist might be divided into different classes and issued with such preference, privilege, or guarantee as the company might direct. The company being in want of money and the original shares being at a great discount, the directors in accordance with resolution duly passed issued preference shares of £1 each with 15s. credited as paid, leaving a liability of only 5s. per share. A contract to this effect was registered under the Companies Act, 1867, sec. 25. The transaction was *bonâ fide* and for the benefit of the company.

An action was brought by an ordinary shareholder to test the validity of the issue.

In the House of Lords the following opinion was expressed by

LORD HALSBURY, L.C.:—My Lords, the question in this case has been more or less in debate since 1883, when Chitty, J., decided

that a company limited by shares was not prohibited by law from issuing its shares at a discount. That decision was overruled, though in a different case, by the Court of Appeal in 1888, and it has now come to your Lordships for final determination.

My Lords, the whole structure of a limited company owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limits it is free to act. Now, confining myself for the moment to the Act of 1862, it makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a *certain fixed amount*. It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they will not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing.

I observe in the argument it has been sought to draw a distinction between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction. The capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security.

It may be that such limitations on the power of a company to manage its own affairs may occasionally be inconvenient, and prevent its obtaining money for the purposes of its trading on terms so favourable as it could do if it were more free to act. But, speaking for myself, I recognize the wisdom of enforcing on a company the disclosure of what its real capital is, and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit.

I think, with Fry, L.J., in the *Almada and Tirito Company's Case* (1), that the question which your Lordships have to solve is one which may be answered by reference to an inquiry: What is the nature of an agreement to take a share in a limited company? and that that question may be answered by saying, that it is an agreement to become liable to pay to the company the

(1) 38 Ch. D. 415.

amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am, therefore, of opinion that, treating the question as unaffected by the Act of 1867, the company were prohibited by law, upon the principle laid down in *Ashbury Company* v. *Riche* (2), from doing that which is compendiously described as issuing shares at a discount.

The question remains whether section 25 of the Act of 1867 has made any difference in the matter now under discussion. That section prescribes that every share in any company shall be deemed and taken to have been issued and to be held *subject to the payment* of the whole amount thereof *in cash,* unless the same shall have been otherwise determined by contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. Two things are manifest in this provision. The share is to be held subject to *payment,* and the payment is to be *in cash.* The amount is to be paid and the whole amount to be paid *in cash,* and to me it appears, looking at the latter part of the section, whereby a contract made and filed may qualify and cut down the form of payment, and that it may be in goods or in value received in some form, instead of in cash, it must nevertheless be payment. I regret that the words *in cash* have received a judicial exposition which allows payment otherwise than in cash, and I hold myself free, if the question should ever come before your Lordships, to consider the propriety of that decision. But for my present purpose it is enough to say that there is nothing in the section which justifies the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all.

The provisions of section 25 were probably to put a stop to such transactions as had become the subject of judicial animadversion in *Pellatt's Case* (3); *Elkington's Case* (4); also *Fothergill's Case* (5), and *Dent's Case* (6).

My Lords, I should have been prepared to take this view if the matter were not covered by authority. But it seems to me that, although not directly in point, the principle laid down by your Lordships' House in *Trevor* v. *Whitworth* (7), would render it extremely difficult to so read the sections to which I have referred as to justify the appellants' contention.

(2) Law Rep. 7 H. L. 653.
(3) Law Rep. 2 Ch. 527.
(4) Law Rep. 2 Ch. 511.
(5) Law Rep. 8 Ch. 270.
(6) Law Rep. 8 Ch. 768.
(7) 12 App. Cas. 409.

Under these circumstances, it seems to me impossible to arrive at any other conclusion than that this appeal must be dismissed with costs. Accordingly, I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

The other learned Lords addressed the House on the principal point likewise.

Ultra Vires. Sale of Shares at Discount. Adjustment of Rights of Contributories on Winding-up.

WELTON v. SAFFREY.

L. R. 1897, A. C. 299.

THE HOUSE OF LORDS.

The appellant was the holder of bonus and discount shares in a company registered under the Companies Act (Eng.). Respondent was the liquidator of the company. He sought to make the appellant liable for calls on these shares to enable him, the liquidator, to adjust the rights of the contributories *inter se*.

KEKEWICH, J., and the Court of Appeal held that the appellant was responsible for the amount remaining unpaid on his shares, not only for the payment of the debts and costs of the winding-up, but also for the adjustment of the rights of contributories *inter se*.

Appeal was brought to the House of Lords.

LORD HALSBURY, L.C.:—My Lords, in respect of the liability to pay up the shares so far as it is necessary to satisfy creditors and the cost of winding-up, I believe no doubt exists in the minds of any of your Lordships. Since the *Ooregum Case* (1), in this House it would be impossible to contend that that question is not covered by authority. But it is said that, where the only object in making a call is to settle the rights of the shareholders *inter se*, the law laid down in the *Ooregum Case* (1), does not conclude the question.

My Lords, I am unable to accede to that view. I think the Legislature, in permitting the existence of a company limited

(1) [1892] A. C. 125.

by shares and with limited liability, created a machinery which makes it impossible by any expedient, either by company or shareholder, to act otherwise than in pursuance of the provisions of the statute. Whether for the purpose of settling the rights *inter se*, or for the purpose of satisfying creditors, it appears to me that the statute enforces upon company and shareholder alike conformity to the rule laid down, that a share for a fixed amount shall make the person agreeing to take that share liable for that amount. I think that is the decision in the *Ooregum Case* (1), and though I am aware that a different view has been suggested where the question is not the payment of the debts of the company, but the settlement of the rights of the shareholders *inter se*, I am unable to see how this artificial creature, limited within its sphere of action by the statute under which it is created, can do anything contrary to the provisions of the statute. It is not a question for what purpose it is done. Dealing with it as I think it must be dealt with, as an artificial creation, it can only act as a company or as shareholder in either of those characters within the fetters created by the Act of Parliament.

It is said, and I think justly said, that people have been invited to take shares under an article of association which expressly provided that shares might be issued at a discount. It is, I think, hard for persons who have relied upon that assurance to find out that the article which authorized the issue of the shares at a discount was *ultra vires* of the company, because it is in conflict with the memorandum of association which by the statute itself must determine the rights in that respect; but not the less on that account must one insist that the statute must be obeyed. If one were to suppose that the whole 6,000 original shareholders or persons who become shareholders by purchase in the market were to have agreed that these shares should only be regarded as having 10s. due upon them, each of them might perhaps against himself establish some contract by which the person agreeing with him in his individual capacity might have rights, but it would not be in his capacity as shareholder—it would be in his capacity as individual. The liquidator can only recognize shareholders, and their relation to the company of which they are shareholders must be regulated by Act of Parliament.

The right to have a call made where it is necessary to adjust the rights between the different shareholders themselves appears to me not less imperative than if only the creditors were in question. The supposed bar to such a proceeding is the agreement not to ask more than 10s. per share upon the discount shares;

but the whole question goes back to the same point. If the Legislature has prohibited that, there is no such agreement. The directors have no power to make such an article. The company *qua* company have no power to agree to such an article, and those who have taken shares and paid for them in pursuance of the Act of Parliament, I think, have a right to have the shares paid up which the Act of Parliament has enacted shall be liable to that payment.

In truth, though in form reserved by the discussion in the *Ooregum Case* (1), I think the *Ooregum Case* (1), does decide the question now in debate, and whether they were bonus shares upon which nothing was paid, or discount shares upon which 10s. only was paid, the holders of those shares are, in my judgment, liable to make good for any company purpose the amount of the money, which, upon the face of the share, they undertake to pay.

My Lords, I confess it seems to me, however hardly it may operate upon individuals, to be a just and right thing that those who have completely discharged their statutory obligations should have a right to call upon the other shareholders to do as they have done and pay what is due upon the shares.

No question as to the preference shares is really in debate.

For these reasons I am of opinion that the order appealed from ought to be affirmed and this appeal dismissed with costs, and I move your Lordships accordingly.

Lords Watson, Macnaghten, Morris and Davey, addressed the House, advising the same result.

Lord Herschell, dissented.

Profits. Division of. Control by Majority of Shareholders.

BURLAND v. EARLE.

L. R. 1902, A. C. 83.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Judicial Committee. Lord Davey, in the course of the judgment of the board, said:

"Their Lordships are not aware of any principle which compels a joint-stock company, while a going concern, to divide the whole of its profits amongst its shareholders. Whether the whole or any part should be divided, or what portion should be divided, and what portion retained, are entirely questions of internal management which the shareholders must decide for themselves, and the Court has no jurisdiction to control or review their decision, or to say what is a 'fair' or 'reasonable' sum to retain undivided, or what reserve fund may be 'properly' required. And it makes no difference whether the undivided balance is retained to the credit of profit and loss account, or carried to the credit of a rest or reserve fund, or appropriated to any other use of the company. These are questions for the shareholders to decide, subject to any restrictions or directions contained in the articles of association or by-laws of the company."

Profits of Company Available for Dividends. Wasting Property.

LEE v. NEUCHATEL ASPHALTE COMPANY.

1887, L. R. 41, Ch. D. 1.

THE COURT OF APPEAL.

The facts are sufficiently set forth in the judgment of Cotton, L.J. It should be added that Mr. Rigby was for the appellant, and that article 100 gave the directors latitude as to forming reserves before recommending dividends, but did not bind them to do so.

COTTON, L.J.:—This is an appeal from a decision of Mr. Justice Stirling, who dismissed the action. The action is brought by one ordinary shareholder, on behalf of himself and all other the ordinary shareholders against the company and the directors, one of whom has been appointed to represent the preference shareholders.

In order to understand the nature of the case, it is necessary to state shortly the nature of the formation of the company. There were six companies, which were in various ways entitled to the benefit of, and were working a concession for carrying on mines near Neuchatel, which produced the asphalte. The present company was formed by the amalgamation of these six companies. The nominal capital of the company is £1,150,000, divided into £10 shares. No money was paid when the present company was formed, but the assets of the previous companies were taken over by the present company, and out of the 115,000 shares in that company 113,700, representing a nominal capital of £1,137,000, were given to the six old companies, and the concession and other rights which were made over were taken as being the assets to answer that share capital.

The object of the action is, on behalf of the ordinary shareholders, to prevent a dividend from being paid out of the excess of the receipts of the company above its expenditure for the year 1885. On what ground is that put? The articles justify the declaration of a dividend by a general meeting without making any reserve for the renewal or replacing of any lease or of the company's interest in any property or concession, but that is said to be *ultra vires*. The plaintiff puts his case in three ways. The first point I understand to be this, that a great part of the capital of the company has been lost. Now, what is meant by "capital"? If it is meant that any part of the assets has been lost, in my opinion that is wrong. I do not say that no part of the assets has ever been lost, but on the evidence before us the assets of this company are of greater value than at the time of the formation of the company in 1873. They then had, it is true, a concession, but for a shorter period than the one they have now got, and the royalty was very heavy. Now they have a longer time for the concession to run than they had in 1873, and they have got very much more profitable terms than they had at the first. In my opinion, so far from there being any loss of assets, the company has now in its possession a larger amount of assets than it had at the time it was first formed. Of course, the present case is very different from that of a company where money

has been paid on all the shares. That case is open to very different considerations. Here all that was taken by this company from the first companies was their assets, and in my opinion those assets have increased in value, so that as a matter of fact that first point entirely fails.

The plaintiff's second point is that the property of the company is not now sufficient to make good the share capital; that assets to provide for that share capital must be made up before any dividend can be declared; and that if dividends are declared without that being done, that is to be treated as a return and a division of capital amongst the shareholders, and therefore illegal. In my opinion that is entirely wrong. It is a misapplication of the term "return of capital."

The word "capital" is used in many senses: one sense is the nominal capital, or, as I prefer calling it, the share capital, that capital which in the case of a company limited by shares is to be defined by the memorandum of association. Mr. Rigby relied on the provision (Companies Act, 1862, sec. 12), that no alteration can be made in that capital but by adding to it except in the case of a reduction under the Act of 1867. It is impossible that the assets can be stated in the memorandum of association, but the share capital has to be stated. Then it is no doubt the law that the capital, in the sense of the assets of the company obtained for the shares, must not be applied except for the purposes of the company. That we shall have to consider both in this and in other parts of the present case. In my opinion there is no obligation in any way imposed upon the company or its shareholders to make up the assets of the company so as to meet the share capital, where the shares have been taken under a duly registered contract, which binds the company to give its shares for certain property without payment in cash. Shares must be paid up in cash, unless under an agreement duly registered there is a contract to allot or give the shares for something different. If there is an arrangement of that kind, which is obviously delusive, it may be that, although it has been duly registered, the shareholders who have taken the shares under it may, on proper proceedings being taken, be obliged to pay up in cash the difference between the value of their property and the nominal amount of their shares. But there is no suggestion that that ought to be done here, and in my opinion it would be wrong to say that a division among the shareholders of money which the company are not bound to apply in making up the nominal amount of

their share capital is a return of capital. In my opinion this second point fails as well as the first.

The third point was to my mind the only one which occasioned any difficulty. It is said that the concession is a wasting property, and as it is a wasting property, that dividing its annual proceeds is dividing part of the capital assets of the company, which are represented by this concession. That was pressed upon us, and that is a difficulty, because it is established, and well established, that you must not apply the assets of the company in returning to the shareholders what they have paid up on their shares, or in paying what they ought to have paid up on their shares. But we must consider exactly how the case stands. There is nothing in the Act which says that dividends are only to be paid out of profits. There is a provision to that effect in Table A, and that rather favours the view that the matter of how profits are to be divided and dealt with, and out of what fund dividends are to be declared, is a matter of internal regulation. But still there is this firmly fixed, that capital assets of the company are not to be applied for any purpose not within the objects of the company, and paying dividend is not the object of the company, the carrying on the business of the company is its object. If this property was property of another nature, property which would not be reasonably or properly consumed in providing profit, the case would stand in a very different position. If there was a permanent property which would not be reasonably or properly so consumed, but the fruit of which only would be used in providing profit, then if the directors were to sell, or the shareholders were to authorize a sale of that, and then to declare a dividend out of the proceeds, that would clearly come within the case of *Guinness* v. *Land Corporation of Ireland* (1), for it would be applying the capital of the company to a purpose which was not authorized. But here, for the purpose of getting the profit, there is necessarily a consumption year by year of part of the capital of the company.

Then what is to be the result? I think that in such a case as this, even without reference to the particular provision of article 100, the question whether what has been done is really a division of capital by way of dividend must be considered in a reasonable and sensible way. If it is made to appear, as was said in *Stringer's Case* (2), "That for the purposes of fraud, or for any other improper motive, a company has declared and paid a wholly delusive

(1) 22 Ch. D. 349. (2) Law Rep. 4 Ch. 475, 488.

and improper dividend, and has thereby in effect taken away from its creditors a portion of the capital which was available for the debts of those creditors, I entertain no doubt the Court would have full jurisdiction, and would exercise it by ordering the repayment of the money so improperly paid." If here it could be shewn that this dividend had been declared from improper motives, fraudulent motives, or with the intention not of dividing profit, but of dividing and returning capital, I think the Court ought to interfere; as it ought, in my opinion, to do in any case where there is any such improper dealing, either by directors or by the majority of the shareholders of the company. But if the Court sees that the directors and the company have acted fairly and reasonably in ascertaining whether this is a division of profit and not of capital, and then in what is really a matter of internal arrangement (if it is done honestly, and does not violate any of the provisions of the articles) the Court is very unwilling to interfere, and in my opinion ought not to interfere, with the discretion exercised by the directors, who have the management of the company, or with the powers exercised by the company within the articles. Of course, if a power given by the articles goes beyond what can be given to the company or to the directors, then the Court must interfere; but in my opinion the only thing here to be considered is—is this really a division of the capital assets of the company under the guise of making and declaring a dividend? In my opinion, in this company, as in other companies, the directors and others who have the control, ought to consider whether in a fair, reasonable way what they are going to divide is to be considered as profits, but, in considering that, they may well have regard to the articles. There is no such necessity as was contended for by Mr. Rigby, to set apart every year a sum to answer the supposed annual diminution in the value of this property from the lapse of time. Reference was made to two decisions of the Master of the Rolls, which I think are to be explained so as in no way to conflict with the decision of Mr. Justice Stirling in this action, *Davison* v. *Gillies* (3), and *Dent* v. *London Tramways Company* (4). Those two decisions are entirely consistent with one another, and entirely depend on the directions contained in the articles of association, not on the general law. In *Davison* v. *Gillies* (3) there was in the articles a direction that profits should be ascertained after making provision for the reparation of the tramway, and the Master of the Rolls said, when profits are to be divided by the directors it must

(3) 16 Ch. D. 347, n. (4) 16 Ch. D. 344.

mean the net profits, and that no dividend could be declared until provision had been made for the depreciation in the tramway and in the plant of the company. In *Dent* v. *London Tramways Company* (4), which was a case where preference shareholders were to have their dividend for each year paid to them out of the profits of that year only, what he held was: that they were entitled to be paid out of the profits of the year after setting aside sufficient for the maintenance of the tramway during that year only; and, therefore, he directed that provision should be made out of the profits of the year, not for the entire depreciation from the neglect to repair the tramway, but for the depreciation attributable to that year. That, in my opinion, entirely explains how those two decisions were come to, which Mr. Rigby contended were not consistent with one another. They favour the view which I entertain, that in considering whether this is to be treated as an honest division of profit, or as a division of capital under the guise of declaring a dividend, the Court will have regard to the directions of the articles, although, of course, if those articles authorize not a mere division of profit but a division of capital (using "capital" in the proper sense of the word—by which I mean permanent assets, and assets not to be expended in providing for the profit earned by the company), such a provision will be *ultra vires* and void. Here there was not a division of capital under the form of a declaration of dividend by a scheme or plan for dividing assets of the company, the declaration of dividend was in accordance with the articles, and not contrary to the general law, and the Court ought not to interfere. In my opinion, therefore, the appeal fails.

LINDLEY, L.J., and LOPES, L.J., reached the same conclusion.

Dividends. Lost Capital.

'VERNER v. GENERAL AND COMMERCIAL INVESTMENT TRUST.

L. R. 1894, 2 Ch. 239.

THE COURT OF APPEAL.

Motion for injunction to restrain payment of dividend until certain loss of capital was made up.

STIRLING, J., declined to make the order.

On appeal the judgment of LINDLEY, L. J. and SMITH, L. J., was read by

LINDLEY, L.J.:—The broad question raised by this appeal is, whether a limited company which has lost part of its capital can lawfully declare or pay a dividend without first making good the capital which has been lost. I have no doubt it can—that is to say, there is no law which prevents it in all cases and under all circumstances. Such a proceeding may sometimes be very imprudent; but a proceeding may be perfectly legal and may yet be opposed to sound commercial principles. We, however, have only to consider the legality or illegality of what is complained of.

As was pointed out in *Lee* v. *Neuchatel Asphalte Company* (1), there are certain provisions in the Companies Acts relating to the capital of limited companies: but no provisions whatever as to the payment of dividends or the division of profits. Each company is left to make its own regulations as to such payment or division. The statutes do not even expressly and in plain language prohibit a payment of dividend out of capital. But the provisions as to capital, when carefully studied, are wholly inconsistent with the return of capital to the shareholders, whether in the shape of dividends or otherwise, except, of course, on a winding-up, and there can, in my opinion, be no doubt that even if a memorandum of association contained a provision for paying dividends out of capital such provision would be invalid. The fact is that the main condition of limited liability is that the capital of a limited company shall be applied for the purposes for which the company is formed, and that to return the capital to the shareholders either in the shape of dividend or otherwise is not such a purpose as the legislature contemplated.

But there is a vast difference between paying dividends out of capital and paying dividends out of other money belonging to the company, and which is not part of the capital mentioned in the company's memorandum of association. The capital of a company is intended for use in some trade or business, and is necessarily exposed to risk of loss. As explained in *Lee* v. *Neuchatel Asphalte Company* (1) the capital even of a limited company is not a debt owing by it to its shareholders, and if the capital is lost, the company is under no legal obligation either to

(1) 41 Ch. D. 1.

make it good, or, on that ground only, to wind up its affairs. If, therefore, the company has any assets which are not its capital within the meaning of the Companies Acts, there is no law which prohibits the division of such assets amongst the shareholders. Further, it was decided in that case, and, in my opinion, rightly decided, that a limited company formed to purchase and work a wasting property, such as a leasehold quarry, might lawfully declare and pay dividends out of the money produced by working such wasting property, without setting aside part of that money to keep the capital up to its original amount.

There is no law which prevents a company from sinking its capital in the purchase or production of a money-making property or undertaking, and in dividing the money annually yielded by it, without preserving the capital sunk so as to be able to reproduce it intact either before or after the winding-up of the company.

A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But in the absence of some special article or contract, there is no law to this effect; and, in my opinion, for very good reasons. It would, in my judgment, be most inexpedient to lay down a hard and fast rule which would prevent a flourishing company, either not in debt or well able to pay its debts, from paying dividends so long as its capital sunk in creating the business was not represented by assets which would, if sold, reproduce in money the capital sunk. Even a sinking fund to replace lost capital by degrees is not required by law.

It is obvious that dividends cannot be paid out of capital which is lost; they can only be paid out of money which exists and can be divided. Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America* (2).

But, although there is nothing in the statutes requiring even a limited company to keep up its capital, and there is no prohibition against payment of dividends out of any other of the

(2) [1892] 2 Ch. 198.

company's assets, it does not follow that dividends may be lawfully paid out of other assets regardless of the debts and liabilities of the company. A dividend presupposes a profit in some shape, and to divide as dividend the receipts, say, for a year, without deducting the expenses incurred in that year in producing the receipts, would be as unjustifiable in point of law as it would be reckless and blameworthy in the eyes of business men. The same observation applies to payment of dividends out of borrowed money. Further, if the income of any year arises from a consumption in that year of what may be called circulating capital, the division of such income as dividend without replacing the capital consumed in producing it will be a payment of a dividend out of capital within the meaning of the prohibition which I have endeavoured to explain.

It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word "profits" is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law. * * *

The appeal must be dismissed.

KAY, L.J., reached the same conclusion.

Profits. Lost Capital. Restoration of. Rights of Holders of Preference Shares.

BOND v. BARROW HAEMATITE STEEL COMPANY.

1901. 71 L. J. Ch. 246.

FARWELL, J.

Holders of preference shares sued that the amount standing to credit of profit and loss account (£240,000) be applied in payment to them of arrears of dividend. There was an actual realized loss of capital of over £200,000, and further loss of capital estimated at £50,000.

The learned Judge held that in the circumstances of this case a declaration of dividend was as essential to the right of the holders of preference shares to demand payment of dividend as to that of ordinary shareholders, and such declaration being absent the action failed. The case is noted here for the following discussion as to the availability of profits for distribution.

FARWELL, J.:— * * * But another point has been taken by the defendants, and, as evidence has been adduced and considerable argument has been addressed to it, I feel bound to state the conclusion at which I have arrived with respect to it. The contention is that, even if the plaintiffs were right in their construction of the articles, the company could not legally pay them the dividends that they claim, because there are no profits properly so called out of which they can be paid; and that any such payment, if made, would be made out of capital. It has been proved to my satisfaction—and indeed counsel for the plaintiffs very properly admitted that they could not dispute that the result of the evidence was—that the company has sustained an actual ascertained and realised loss of capital to an amount exceeding £200,000, and has also lost capital by estimate and valuation to an amount exceeding £50,000. The various sums claimed by the plaintiffs as available to pay their dividends amount to about £240,000. If, therefore, these ascertained and estimated losses have to be made good before any dividend can properly be paid, there are obviously no funds out of which to pay dividends. The defendants allege, and the plaintiffs deny, that the company are bound to make good these losses before pay-

ing any dividend. The question is one of very considerable difficulty on the authorities; but the result of those authorities is, in my opinion, that there is no hard and fast rule by which the Court can determine what is capital and what is profit. "The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question"—*Per* Lord Halsbury, L.C., in *Dovey* v. *Cory* (1). "It may be safely said that what losses can be properly charged to capital, and what to income, is a matter for business men to determine, and it is often a matter on which the opinion of honest and competent men will differ. * * * There is no hard and fast legal rule on the subject"—*Per* Lord Justice Lindley in *In re National Bank of Wales, Cory's Case* (2). It is, however, necessary to bear in mind that the two propositions—first, that dividends must not be paid out of capital; and secondly, that dividends may only be paid out of profits—are not identical, but diverse. The first is the requirement of the statutes, and cannot be dispensed with; the latter is in Table A or the articles of the particular company, and is one of the regulations of the company which has to be construed. A company which has a balance to the credit of its profit and loss account is not bound at once to apply that sum in making good an estimated deficiency in value of its capital assets. It may carry it to a suspense account, or to reserve; and, if the assets subsequently increase in value, the amount neither has been, nor will be, part of the capital. If, therefore, a part of such balance is used in paying dividends, such dividends are not paid out of capital, because the sum has never become capital, although it still remains a question whether they have been paid out of profits or not. It has been pointed out by Lord Justice Lindley, in *Lee* v. *Neuchatel Asphalte Co.* (3), that there is nothing in the statutes requiring a company to keep up the value of its capital assets to the level of its nominal capital. The requirement is merely negative—that dividends shall not be paid out of capital; and the balance to the credit of profit and loss account does not automatically become part of the capital assets because the value of the actual capital assets has depreciated to an amount equal to, or exceeding, such balance. The real question for determination, therefore, is whether there are profits available for distribution, and this is to be answered according to the circumstances of each particular case, the nature of the company, and the evidence of

(1) 70 L. J. Ch. 753, 759; [1901] A. C. 477, 486.
(2) 68 L. J. Ch. 634, 651; [1899] 2 Ch. 629, 670.
(3) 57 L. J. Ch. 622; 41 Ch. D. 1.

competent witnesses. There is no single definition of the word "profits" which will fit all cases. Take, for instance, Professor Marshall's definition (Economics, ed. 1883, p. 142): "The excess of the receipts from the business during the year over the outlay for the business, the difference between the value of the stock and plant at the end and at the beginning of the year being taken as part of the receipts or as part of the outlay according as there has been an increase or decrease of value." I am precluded from adopting this in its entirety by authorities which are binding on me, because, in the definition, "stock and plant" obviously include both fixed and circulating capital as defined at p. 134 of the same treatise. See, for instance, Lord Lindley's judgment in *Verner* v. *General and Commercial Investment Trust* (4), where he says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be so sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up." I do not understand his Lordship to be laying down a general and universal rule, that in every company fixed capital may be so sunk and lost, but that there are companies in which that may be the case. All the authorities, however, agree, I think, that circulating capital must be kept up. Now in the present case the £200,000 realised loss arises by the surrender of the leases of certain mines, by the pulling down of certain furnaces, and on the sale of certain cottages. The company is a smelting company on a very large scale, and for the convenience of its works, and by way of economy, they acquired the leases of the surrendered mines, in order to supply themselves with their own ore, instead of buying it as required. The ore was used exclusively for the purposes of the company's works. The mines were drowned out, and the cost of pumping them out was prohibitive. The company, therefore, surrendered the leases, pulled down the blast furnaces, and sold the cottages connected therewith. Now the evidence before me is all on one side. The plaintiffs called none, and Sir David Dale and the defendants' other witnesses all agree that, in a company of this nature, these items ought to come into the account before any profit can be said to be earned; and my own opinion coincides with theirs, inasmuch as I think that the money invested in those items is properly regarded in this company as circulating capital. Suppose the company had bought enormous stocks of ore sufficient to last for ten years, it could hardly be

(4) 63 L. J. Ch. 456, 462; [1894] 2 Ch. 239, 266.

said that the true value of so much of this as remained from time to time ought not to be brought into the balance-sheet; and I can see no difference for the purpose of the account between ore *in situ* and ore so bought in advance. The blast furnaces and cottages are mere accessories to the ore, and resemble a building for burning the stores bought in advance already mentioned.

There is more difficulty about the remanining £50,000. I think that the onus is on the plaintiffs to shew that it is fixed capital, and that in a company of this nature such fixed capital may be sunk or lost. They have not done this, and the evidence, so far as it goes, is the other way. But this is not an actual loss, but depreciation by estimate. The plaintiffs really relied on *Lee v. Neuchatel Asphalte Co.* (3) as an authority for this proposition as a universal negative—namely, that no company owning wasting property need ever create a depreciation fund. In my opinion, that is not the true result of the decision. It must be remembered that in that case there had been no loss of assets. The company's assets were larger than at its formation, and the Court decided nothing more than the particular proposition that some companies with wasting assets need have no depreciation fund. For instance, I cannot think that it would be right for the defendant company to purchase out of capital the last two or three years of a valuable patent, and distribute the whole of the receipts in respect thereof as profits without replacing the capital expended in purchase. It is for the Court to determine in each case, on evidence, whether the particular company ought, or ought not, to have such a fund. There is no doubt as to the opinion of the witnesses in this case, and, further, the opinion of the directors, cannot be altogether disregarded. The Courts have, no doubt, in many cases, overruled directors who proposed to pay dividends, but I am not aware of any case in which the Court has compelled them to pay, when they have expressed their opinion that the state of the accounts did not admit of any such payment. In a matter depending on evidence and expert opinion, it would be a very strong measure for the Court to override the directors in such a manner. I have made no distinction between the realised loss and the estimated loss, because the witnesses declined to recognise any such distinction, and also because the decided cases deal only with the distinction between floating and fixed capital, and do not distinguish between realised and estimated loss, and it would serve no useful purpose for me to express any opinion on the subject.

The result is that the action fails, and must be dismissed with costs.

Preference Shares. Right to Issue under Special Resolution though not Originally Contemplated. Altering Constitution by Special Resolution.

ANDREWS v. GAS METER COMPANY,

L. R. 1897, 1 Ch. 361.

THE COURT OF APPEAL.

LINDLEY, L.J., delivering judgment of the Court said:

The question raised by this appeal is whether certain preference shares issued by a limited company as long ago as 1865 were validly issued or not. If they were not, a further question will arise, which is—what are the rights of their present holders? The company was formed and registered as a limited company under the Companies Act, 1856; but in October, 1862, it was registered under the Companies Act, 1862, and it is by that Act and the decisions upon it that the above questions have to be determined. The company's original capital as stated in its memorandum as association was "£60,000, divided into 600 shares of £100 each, every share being sub-divisible into fifths, with power to increase the capital as provided by the articles of association." By the articles of association which accompanied the memorandum of association, and were registered with it, power was given to the company to increase the capital (article 27), and it was provided that any new capital should be considered as part of the original capital (article 28). The issue of preference shares was not contemplated or authorized. In 1865 the company desired to acquire additional works, and passed a special resolution under the powers conferred by the Companies Act, 1862, secs. 50 and 51, altering the articles and authorizing the issue of 100 shares of £100 each, fully paid, and bearing a preferential dividend of £5 per cent. per annum. Those shares were accordingly issued to the vendors of the works referred to, and are the shares the validity of which is now in question. The company has been prosperous, and the ordinary shareholders have for years received a higher dividend than the preference shareholders. A considerable reserve has also been accumulated, and this action has been brought to determine the rights of the preference shareholders to this reserve fund. The learned Judge has held that the creation of the preference shares was *ultra vires*.

and that their holders never became and are not now shareholders in the company, and that they have none of the rights of shareholders, whether preference or ordinary. He has not, however, declared more definitely what their rights are. They have appealed from this decision: but on the appeal they only claimed to be preference shareholders entitled to a preferential dividend of 5 per cent. Their claim to any share of the reserve fund was dropped. The judgment against the validity of the preference shares is based upon the well-known case of *Hutton* v. *Scarborough Cliff Hotel Co.* (1), which came twice before Kindersley, V.-C., in 1865, and which Kekewich, J., very naturally held to be binding on him. Kindersley, V.-C.'s first decision was that a limited company which had not issued the whole of its original capital could not issue the unallotted shares as preference shares unless authorized so to do by its memorandum of association or by its articles of association. This decision was affirmed on appeal (2), and was obviously correct; and would have been correct even if the whole of the original capital had been issued and the preference shares had been new and additional capital. The company, however, afterwards passed a special resolution altering the articles and authorizing an issue of preference shares. This raised an entirely different question, and led to the second decision. (3) The Vice-Chancellor granted an injunction restraining the issue of the preference shares, and he held distinctly that the resolution altering the articles was *ultra vires*. He did so upon the ground, as we understand his judgment, that there was in the memorandum of association a condition that all the shareholders should stand on an equal footing as to the receipt of dividends, and that this condition was one which could not be got rid of by a special resolution altering the articles of association under the powers conferred by secs. 50 and 51 of the Act. The judgment of the Vice-Chancellor is a little obscure, because he treats the condition as a condition of the constitution of the company, and he may have meant by that expression either the constitution as fixed by the memorandum of association or the constitution as fixed by the memorandum of association and the original articles. But unless he had meant the constitution of the company as fixed by the memorandum of association his decision is unintelligible; for, so far as the constitution depended on the articles, it clearly could be altered by special resolution under the powers conferred by secs.

(1) 2 Dr. & Sm. 514, 521. (2) D. J. & S. 672.
(3) 2 Dr. & Sm. 521.

50 and 51 of the Act. A company cannot deprive itself of this power: see *Mallinson* v. *National Insurance and Guarantee Corporation* (4), and *Walker* v. *London Tramways Co.* (5)

The Lord Justice then proceeded to discuss certain cases and held that the second decision in *Hutton* v. *Scarborough Cliff Hotel Company* (1) was wrong, and that the resolution in question in this case was *intra vires* and valid.

Preference Shares. Cumulative Dividends.

STAPLES v. EASTMAN PHOTOGRAPHIC MATERIALS CO.

L. R. 1896, 2 Ch. 303.

THE COURT OF APPEAL.

The company was registered in November, 1889, and the 5th clause of the memorandum of association was as follows:—

"The capital of the company is £150,000, divided into 10,000 ordinary shares of £10 each, and 5,000 preference shares of £10 each. The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of £10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon. After payment of such preferential dividend the holders of ordinary shares shall be entitled to a like dividend at the rate of £10 per cent. per annum on the amount paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend."

For the year 1890, £10 per cent. was paid on the preference shares, and £5 per cent. on the ordinary shares; for 1891, £10 per cent. on the preference shares, and £7 per cent. on the ordinary shares; for 1892 no dividend was paid; for 1893, £5 per cent. was paid on the preference shares only; for 1894, £2 10s. per cent. on preference shares only. For 1895 a substantial profit was made, and the directors proposed to pay £10 per cent. to the preference shareholders and a dividend to the ordinary shareholders.

(4) [1894] 1 Ch. 200. (5) (1897), 12 Ch. D. 705.

This action was commenced by Staples on behalf of himself and all other the preference shareholders, asking a declaration that the preference shareholders were entitled to be paid a dividend of £10 per cent. for the years 1892, 1893, and 1894, and that the deficiency must be made good before any payment in respect of dividends on the ordinary shares.

CHITTY, J., decided in accordance with the plaintiff's contention.

LINDLEY, L.J.:—We cannot any of us construe this clause in the way in which the learned Judge has done. I will read the clause: "The capital of the company is £150,000, divided into 10,000 ordinary shares of £10 each, and 5,000 preference shares of £10 each." The question before us is, what is the preference given to the holders of preference shares? Are they to have cumulative dividends, or are they to have dividends only according to the share of profits in each year in which there are profits? The language is this: "The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of £10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon." What is the meaning of that? Is that the language employed when it is intended to give cumulative dividend so that if there are no profits in one year the arrears of dividend are to be carried forward and paid out of the profits of the subsequent years? I confess I do not think that is so. I should have said that the obvious meaning of these words was that the profits of each year were to be divided in this way—there is 10 per cent. to go in the first place to the preference shareholders, and then, under the next clause, a like dividend to the ordinary shareholders. Chitty, J., has ceded to the view pressed upon him by Mr. Latham that it is to be read thus: "The holders of preference shares shall be entitled to 10 per cent. per annum on the amount for the time being paid or deemed to be paid up thereon, and such 10 per cent. is to be paid out of the net profits of each year." If that were the meaning of the language the decision would be right; but I do not think that is its meaning. It appears to me that the reference of the dividend to the profits of each year is most marked. It is suggested that the clause means they are to have per annum 10 per cent.; but so to read it is to refer "per annum" to the wrong antecedent. "Per annum" refers to the rate and nothing else. The ordinary meaning of the language of this clause appears to me to be this: that the profits of each year are

to be divided as follows—give 10 per cent. first to the preference shareholders, and then, if the profits are sufficient for the purpose, 10 per cent. to the ordinary shareholders, and then, if there is a surplus, that is to be divided equally amongst the shareholders. That is the view which I take, and I do not think any of the cases warrant a decision to the contrary. The language in *Henry* v. *Great Northern Ry. Co.* (1) was such as to make it tolerably plain that what was there promised to the preference shareholders was 10 per cent., and it was called interest or dividend. In the case of *Webb* v. *Earle* (2) the words were "a dividend of 10 per cent. per annum paid half-yearly" without any such context as we have here—without anything to shew out of what it was to be paid. With deference to Chitty, J., I think that this language does not entitle the preference shareholders to a cumulative dividend, and the appeal must be allowed.

LOPES, L.J., and KAY, L.J., to like effect.

Preference Shares. Surplus Assets. Distribution.

BIRCH v. CROPPER.

IN RE BRIDGEWATER NAVIGATION COMPANY, LIMITED.

1889, 14 App. Cas. 525.

THE HOUSE OF LORDS.

Appeal from a decision of the Court of Appeal affirming a decision of North, J.

The question was on which principle a balance of about £550,000, after satisfying all liabilities, was to be distributed among the preference and the ordinary shareholders respectively of the above company in a voluntary winding-up.

NORTH, J., held that the balance ought to be divided among the holders of all the shares in proportion to the amounts respectively paid up thereon.

The holders of the ordinary shares appealed.

(1) 1 De G. & J. 606. (2) L. R. 20 Eq. 556.

Lord Herschell, in part, said:— * * * I turn now to the considerations which have led me to the conclusion that the surplus ought to be divided amongst the shareholders according to the shares which they hold in the company.

The present company has been prosperous, and the result of the winding-up is to leave a considerable surplus of assets over liabilities after returning all the capital. But I think we are naturally led to inquire how the different classes of shareholders would have been dealt with if the reverse had been the case, and a loss had resulted. This has been the subject of decision. It has been held, and I think rightly, that in such a case where there is no provision to the contrary in the articles of the company the loss is not to be borne in the proportion in which it has been declared in the present case that the surplus is to be distributed. In the case of the *Anglesea Colliery Company* (1) it was held by Lord Hatherley when Vice-Chancellor, and his judgment was affirmed on appeal, that the liquidators were entitled to make a call for the purpose of adjusting the rights of the members so that the losses should fall equally on all, without regard to the amount which they had paid up on their shares. And in the case of *Ex parte Maude* (2) where some of the shareholders had paid £20 and others £25 a share, and a surplus was left after discharging the liabilities of the company, the liquidators were held to be bound to pay out of these assets £5 to each shareholder who had paid £25 before distributing the surplus rateably. One of the articles of that company provided that the directors might declare a dividend to be paid to the shareholders in proportion to the number of their respective shares "and the amount paid up thereon respectively," and this was relied on as shewing that the loss ought to be proportioned to the amount paid up. Mellish, L.J., however said: "In my opinion we cannot draw any inference from article 114 beyond that which it states, and we cannot infer that the shareholders meant to make such an important alteration as that in case of the company being wound up the losses should be divided in proportion to the amount paid up and not to the amount subscribed." And he held that the true view of the Companies Act was that the losses were to be borne, not in proportion to the amount paid up, but to the subscribed capital. Where the articles are silent on the subject, why should a different rule prevail as regards surplus assets? Where there is no agreement as to either it would seem only natural and equitable, that loss should be borne and benefits shared in the same proportion. And,

(1) Law Rep. 2 Eq. 379; 1 Ch. 555. (2) Law Rep. 6 Ch. 51.

in my opinion, this is the true principle to apply. In the course of the argument, I put the case of a company being wound up, having a large asset of doubtful value, and not capable of immediate realization. In such a case it might be necessary or prudent to call up the unpaid capital in order to discharge the liabilities of the concern, even though it turned out that this asset was more than sufficient to meet them. If the capital were thus called up the surplus would be distributed rateably amongst all the shareholders, whereas supposing the judgment under appeal to be correct, if the asset had been first realized, the distribution amongst the two classes of shareholders would have been very different. The rights and interests of the shareholders in the company would thus be made to depend on the urgency of the creditors or the timidity of the liquidators, a result neither satisfactory nor equitable. I observe that the same consideration occurred to Mellish, L.J., in the case I have just referred to. He said, "If any other construction were adopted it would make the way in which the losses are borne depend upon the accident whether the assets could be immediately realized, or whether it was necessary to make a call to pay the debts. If the £5 per share had been called up to pay pressing debts, it could not be denied that the assets when got in would be divided *pro rata;* that is to say, the losses would be borne by the shareholders in proportion to their subscribed capital. Here it happened that the assets were immediately realized or that the creditors did not press for payment, so that a call was not necessary before the assets were divided, but that accident ought not to alter the way in which the assets are to be divided." Surely all this applies with equal force to the profit resulting on the winding up of the undertaking. The truth is that each member who has subscribed for a £10 share owns the same share in the company whether it be or be not paid up, and if he is so regarded for the purpose of meeting losses, I cannot see that it is equitable that he should be otherwise dealt with when we are considering to what share of the profit he is entitled. When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property. It may be that the principle which I recommend your Lordships to adopt will not secure absolutely equal or equitable treatment in all cases, but I think that it will in general attain that end more nearly than any other which has been proposed.

I am therefore of opinion that the judgment appealed from should be reversed; and that it should be declared that the balance

of the proceeds of sale ought to be divided amongst the holders of all the shares in the Bridgewater Navigation Company, Limited, in proportion to the shares held by them respectively.

The other learned Lords gave reasons for the same conclusion.

Auditors' Duties and Responsibilities.

IN RE LONDON AND GENERAL BANK (No. 2.)

L. R. 1895, 2 Ch. 673.

THE COURT OF APPEAL.

Upon the subject of the duty and responsibility of an auditor of a financial corporation, it was said by

LINDLEY, L.J.:— * * * It is impossible to read sec. 7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the

books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance-sheet shewing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of Stirling, J., in *Leeds Estate Building and Investment Co.* v. *Shepherd* (1). An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. Mr. Theobald's evidence satisfies me that he took the same view as myself of his duty in investigating the company's books and preparing his balance-sheet. He did not content himself with making his balance-sheet from the books without troubling himself about the truth of what they shewed. He checked the cash, examined vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and in one case obtained a solicitor's opinion on the validity of an equitable

(1) 36 Ch. D. 802.

charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty is not too high for business purposes, and is recognised as correct by business men. The balance-sheet and certificate of February, 1892 (*i.e.*, for the year 1891), was accompanied by a report to the directors of the bank. Taking the balance-sheet, the certificate, and report together, Mr. Theobald stated to the directors the true financial position of the bank, and if this report had been laid before the shareholders Mr. Theobald would have completely discharged his duty to them. Unfortunately, however, this report was not laid before the shareholders, and it becomes necessary to consider the legal consequences to Mr. Theobald of this circumstance. A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated amongst a large body of shareholders would, by its consequent publicity, be very injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge his duty if, instead of publishing his report in such a way as to insure publicity, he made a confidential report to the shareholders and invited their attention to it and told them where they could see it. The auditor is to make a report to the shareholders, but the mode of doing so and the form of the report are not prescribed. If, therefore, Mr. Theobald had laid before the shareholders the balance-sheet and profit and loss account, accompanied by a certificate in the form in which he first prepared it, he would perhaps have done enough under the peculiar circumstances of this case. I feel, however, the great danger of acting on such a principle; and in order not to be misunderstood I will add that an auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril and runs the very serious risk of being held judicially to have failed to discharge his duty.

The auditor was held liable for not seeing that the shareholders got the same information as to the unsatisfactory position of the bank that he gave to the directors.

Auditors. Duties and Responsibilities.

In re KINGSTON COTTON MILL COMPANY (No. 2).

L. R. 1896, 2 Ch. 279.

THE COURT OF APPEAL.

In this case an attempt was made to fasten liability on an auditor for not testing a manager's certificate as to stock on hand.

Lopes, L.J.:— * * * But in determining whether any misfeasance or breach of duty has been committed, it is essential to consider what the duties of an auditor are. They are very fully described in *In re London and General Bank* (1); to which judgment I was a party. Shortly they may be stated thus: It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom: but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.

In the present case the accounts of the company had been for years falsified by the managing director, Jackson, who subsequently confessed the frauds he had committed. It is only, however, just to him to say that they were not committed with a view of putting money in his own pocket, but for the purpose of making things appear better than they really were and in the hope of the company ultimately recovering itself. Jackson deliberately overstated the quantities and values of the cotton and yard in the company's mills. He did this for many years. It was proved that there is great waste in converting yarn into cotton, and the fluctuations of the market in the prices of cotton and

(1) [1895] 2 Ch. 673.

yarn are exceptionally great. Jackson had been so successful in falsifying the accounts that what he had done was never detected or even suspected by the directors. The auditors adopted the entries of Jackson and inserted them in the balance-sheet as "per manager's certificate." It is not suggested but that the auditors acted honestly and honestly believed in the accuracy and reliability of Jackson. But it is said that they ought not to have trusted the figures of Jackson, but should have further investigated the matter. Jackson was a trusted officer of the company in whom the directors had every confidence; there was nothing on the face of the accounts to excite suspicion, and I cannot see how in the circumstances of the case it can be successfully contended that the auditors are wanting in skill, care, or caution in not testing Jackson's figures.

It is not the duty of an auditor to take stock; he is not a stock expert; there are many matters in respect of which he must rely on the honesty and accuracy of others. He does not guarantee the discovery of all fraud. I think the auditors were justified in this case in relying on the honesty and accuracy of Jackson, and were not called upon to make further investigation. It is not unimportant to bear in mind that the learned Judge has found the directors justified in relying on the figures of the managing director.

The duties of auditors must not be rendered too onerous. Their work is responsible and laborious, and the remuneration moderate. I should be sorry to see the liability of auditors extended any further than in *In re London and General Bank* (1). Indeed, I only assented to that decision on account of the inconsistency of the statement made to the directors with the balance-sheet certified by the auditors and presented to the shareholders. This satisfied my mind that the auditors deliberately concealed that from the shareholders which they had communicated to the directors. It would be difficult to say this was not a breach of duty. Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold would make the position of an auditor intolerable.

The other learned Judges similarly expressed themselves.

Foreign Corporations. Status of.

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE WESTERN UNION TELEGRAPH COMPANY.

1889, 17 S. C. R. 151.

THE SUPREME COURT OF CANADA.

The case is quoted for the instructive discussion of the comity of nations as affecting artificial persons.

Sir W. J. Ritchie, C.J., in part said:

"The comity of nations distinctly recognises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a state may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such proper terms and conditions as it may prescribe. With respect to foreign corporations generally, the statutes of New Brunswick provide for the service of process on foreign corporations carrying on business by agents in the Province "whose chief place of business is without the limits of the Province, and if established by the law of any other place," and provision is made for the proof of contracts by foreign corporations. * * *

"The following authorities, both English and American, may be cited to establish the principles before indicated."

"The Law of Domicile. A. V. Dicey. Rule 42, p. 198:

'The existence of a foreign corporation duly created under the law of a foreign country is recognized by our Courts.

'The principle is now well established that a corporation duly created in one country is recognized as a corporation by other States. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.'

"Story on Conflict of Laws, ch. 4, sec. 106:

'The power of a corporation to act in a foreign country depends both on the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers

as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits. * * *

"In *Merrick* v. *San Santvoord* (1), Porter, J., says:—

'We think the policy of the State is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad.

* * * * * *

'The rules of comity are subject to local modification by the law-making power; but until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure it is the duty of the Courts to respect, until the sovereign sees fit to deny them. The rights of a foreign suitor or defendant, so far as they are unabridged by legislation, are as imperative and absolute as those of the citizen. These rules have their place in every system of jurisprudence.

* * * * * *

'The rights of foreign corporations have been protected in the English Courts on the same general principle of public law. *The Nabob of Carnatic* v. *The East Indian Co.* (2); *The Dutch West India Company* v. *Henriquez* (3); *The King of Spain* v. *Hullett* (4), We had the benefit of the rule in the suit instituted in Great Britain, in the case of *The United States* v. *Smithson's Executors*. Indeed, the law of international comity in the interest of commerce, which has so long prevailed in that country, is recognised in a provision of Magna Charta, which elicited from Montesquieu the encomium, that the English have made the protection of foreign merchants one of the articles of their own liberty.

* * * * * *

'It was a suggestion in answer to the argument that, inasmuch as the corporation could not migrate, it could neither contract nor sue, except in the State of its domicile. He admitted its incapacity to migrate, but held that it did not follow that its existence there would not be recognised elsewhere. It was accordingly adjudged, in that case, that contracts made in the city of Mobile, between citizens of Alabama and a Georgia bank, a Pennsylvania bank and a Louisiana railroad company respectively, could be enforced under

(1) 34 N. Y. 216.
(2) 1 Ves. 371.
(3) 1 Strange, 612.
(4) 2 Bligh's N. S. 31.

the general law of comity as contracts within the scope of their respective charters, though unauthorised by the State of Alabama. The Chief Justice expressed the opinion that no valid reason can be assigned for refusing to give effect to the contracts of foreign corporations "when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the laws of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognising the law of another State" (5). The concession referred to was reiterated in the same sense by Judge Thompson, and in answer to a similar argument in the case of *Runyan* v. *Coslar,* in which it was adjudged that a coal company organised in New York, for the purpose of mining coal in Pennsylvania, could exercise its franchise by purchasing and holding lands in the latter State; and though, by a statute of Pennsylvania, lands so acquired were subject to forfeiture, the title of the company was good so long as the forfeiture was not enforced by the State' (6).

"In *Bank of Augusta* v. *Earle* (7), Taney, C.J., says:—

'It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court. It was so held in the case of *The United States* v. *Amedy* (8) and in *Beaston* v. *The Farmer's Bank of Delaware* (9). Now, natural persons through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers,

(5) 13 Peters 519, 588-590.
(6) 14 Peters, 122, 129.
(7) 13 Peters, 588.
(8) 11 Wheat 412.
(9) 12 Peters, 135.

in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

* * * * * *

'Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the laws of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its Courts since the case *Henriquez* v. *The Dutch West India Company,* decided in 1729 (10). And it is a matter of history, which this Court are bound to notice, that corporations, created in this country, have been in the open practice, for many years past, of making contracts in England of various kinds, and to very large amounts: and we have never seen a doubt suggested there of the validity of these contracts by any Court or any jurist.

* * * * * *

'It has been decided in many of the State Courts, we believe in all of them where the question has arisen, that the corporation of one State may sue in the Courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the Courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty—where the last-mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would, of course, be permitted to compromise, if it thought proper, with its debtor; to give him time, to accept something else in satisfaction, to give him a release, and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately

(10) 2 Ld. Raym. 1532.

connected with the right to sue that the latter could not be effectually exercised if the former were denied.

* * * * * *

'We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts; and that the same law of comity prevails among the several sovereignties of this Union.

* * * * * *

'But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favour of its adoption can no longer be made.

* * * * * *

'We have already shewn that the comity of suit brings with it the comity of contract, and where the one is expressly adopted by its Courts, the other must also be presumed according to the usages of nations, unless the contrary can be shewn.'"

The rest of the Court agreed with the Chief Justice, excepting Gwynne, J., who thought the comity of nations did not avail the defendants in the circumstances.

Effect of Local Laws upon International Comity.

The foregoing case sets forth the recognized comity extended to foreign corporations. The nature of the regulations commonly imposed in the provinces upon foreign companies, prior to their receiving the benefits of the comity, is well known. This includes enrolment and license, with stipulation as to resident attorney, and periodical reports to Government. As to purely foreign companies depending solely on comity, there is no question as to the validity of these stipulations, except it be found in an issue between the Dominion and the Province as to which of them has the right to impose these conditions. That question seems so far to be limited in practical application to foreign insurance companies. This belong to the constitutional phase of company law in Canada. As is well known, substantial constitutional questions on company subjects have been raised in Canada, and a variety of legal decisions have followed. These cases include the questions as to provincial right to impose on Dominion

companies the obligation of taking a license as a condition of exercise of corporate capacity in the Province; as to the extent (territorial and otherwise) of the corporate capacity which a Provincial Legislature may give to a corporation; as to the privileges and obligations in any province pertaining to a body corporate under corporate rights granted by the Dominion (a) within the expressed, exclusive powers of the Dominion Parliament, and (b) within its general powers of incorporation. To reproduce these cases or any substantial portion here, while desirable, would extend this collection far beyond the contemplated limits. The student will be able to appreciate the questions and follow the long train of legal discussion by referring to the cases noted below, with the various authorities discussed therein.

1. *The Companies Reference* (48 S. C. R. 331).

2. *John Deere Plow Company* v. *Wharton* ((1915), A. C. 330).

3. *The Bonanza Creek Gold Mining Company* v. *The King* (50 S. C. R. 534).

4. *Can. Pac. Ry.* v. *Notre Dame de Bonsecours Parish* (1899, A. C. 367).

5. *Montreal City* v. *Montreal St. Ry.* (1912, A. C. 333).

6. *Attorney-General (Alberta)* v. *Attorney-General (Canada)* (84 L. J. P. C. 58.

Winding-up. Dominion Jurisdiction as to Provincial Incorporations. (1) Insolvent. (2) Voluntarily Applying Dominion Act.

SHOOLBRED v. CLARKE, Re UNION FIRE INSURANCE CO.

1890, 17 S. C. R. 265.

THE SUPREME COURT OF CANADA.

Appeal from an order for the winding-up under the Dominion Act of a company incorporated under Provincial legislation.

Other questions arose, but the case is noted for the discussion of jurisdiction.

PATTERSON, J., in part, said:— * * * First, it is contended that the Dominion Winding-up Act does not apply to the Union

Fire Insurance Company because that company was incorporated by Provincial and not Dominion legislation; and then, assuming the Act to apply to the company, it is objected that its provisions do not authorise the order made by the Chancellor.

The interpretation clause of the Act, R. S. C. ch. 129, defines the expression "insurance company" as used in the Act, as meaning a company carrying on, either as a mutual or a stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise; and defines the expression "winding-up order" as meaning an order granted by the Court under that Act to wind up the business of the company, including any order granted by the Court to bring within the provisions of the Act any company in liquidation or in process of being wound up.

Section 3 declares that the Act applies to certain incorporated companies, including incorporated insurance companies, wheresoever incorporated, and

(*a*) which are insolvent; or

(*b*) which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators, ask to be brought under the provisions of the Act.

No language could be more general and comprehensive or less calculated to suggest the exclusion of any class of incorporated companies, nor has any good reason been given for thinking such exclusion can have been intended.

The Provincial legislatures have, under sec. 92 of the B. N. A. Act, exclusive power to make laws in relation to the incorporation of companies with provincial objects; but the body politic created by any such act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of the subjects over which exclusive legislative jurisdiction is given to the Parliament of Canada, as well as others in relation to which the Parliament may make laws for the peace, order and good government of Canada, the legislation on which must govern all corporate bodies, as well as natural bodies; for example, interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency.

In its compulsory operation upon incorporated companies, the Winding-up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of sec. 3 when they are already in liquidation or in process of being wound up. This may be on

petition of creditors or assignees, as well as of shareholders or liquidators; but original proceedings under the Winding-up Act can be instituted only by creditors and only when the company is insolvent.

A wider power now exists under the Winding-up Amendment Act, 1889, 52 Vic. ch. 32 (D). That Act authorises voluntary winding-up proceedings at the instance of the company or a shareholder, following in this respect the 129th section of the English Companies Act, 1862, which is also followed by the Ontario Winding-up Act, R. S. O. (1887), ch. 183. But that provision for voluntary winding-up is not extended, like the Winding-up Act, to all corporations. It is confined by sec. 2 to companies incorporated "by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the late Province of Canada, or of the Province of Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada."

This obviously is intended to exclude companies incorporated by provincial legislation since Confederation under the exclusive legislative jurisdiction given to the Provinces. Ontario, Quebec and Manitoba are not named, and misapprehension as to the four provinces which have retained their anti-Confederation names is shut out by the reference to the legislative authority of the Parliament of Canada. Thus, the provision for voluntary winding-up is expressly confined to a class of corporations in which the Union Fire Insurance Company is not included, and the unlimited application of the Winding-up Act to the compulsory liquidation of the affairs of all insolvent corporations is made more clear.

It was argued that the third section of the Act of 1889, which I have just quoted, went to shew, by the omission of the name of the Province of Ontario, that the Winding-up Act did not apply to this Ontario company. This Court may be said to have in effect decided that it did so apply when it remitted the matter to the High Court after the formal appeal; and the leave to bring forward the present appeal was granted partly, if not principally, to give an opportunity to discuss the effect of the Amendment Act as a legislative explanation of the Winding-up Act.

It is clear that the Act of 1889 bears on the question in no other way than to make the unlimited extent of the principal Act more manifest.

It is, it is true, to be read with and construed as forming part of the Winding-up Act; but that is by the introduction into the statute of a set of provisions for the voluntary winding up of a limited class of corporations, to which provisions the expressions in sec. 3 "this Act applies," etc., must be referred. The section does not qualify or supersede sec. 3 of the principal Act. The term "this Act" means, and will continue to mean, the Amendment Act, and not the whole Winding-up Act.

There are, in this Act of 1889, specific amendments of several sections of the Winding-up Act. Those sections, as amended, must continue to apply to the same companies as before, although the amendments are made by an Act which is declared to apply to a more limited class of companies. There, is doubtless, a want of precision in this particular, but the Act can be read according to its evident intent without violence, even to the literal wording. There are no restrictive words in sec. 3, such as "shall only apply," and yet the newly introduced powers touching voluntary liquidation will be confined to the class of companies specified in sec. 3 because, being newly created, they have only the extent expressly assigned to them.

There is, in my opinion, no reasonable doubt that the Union Fire Insurance Company is subject to the provisions of the Winding-up Act.

And such was the decision of the Court.

Winding-up. Foreign Corporation. Extent of Dominion Jurisdiction. Discretion of Court.

ALLEN v. HANSON.

IN RE THE SCOTTISH CANADIAN ASBESTOS COMPANY, LIMITED.

1890, 18 S. C. R. 667.

THE SUPREME COURT OF CANADA.

The question raised on this appeal was, whether a winding-up order under the Canadian Act could be made against a company incorporated under the Imperial Act, having assets in Canada,

and whether the legislation of the Canadian Parliament providing therefor was *intra vires*. The exact circumstances of the case have a bearing on the question. Proceedings had been taken in Scotland for the winding-up, and the proceedings in Canada, out of which the appeal arose were ancillary thereto.

SIR W. J. RITCHIE, C.J.:—[After stating the facts of the case, his Lordship proceeded as follows:—]

"The following cases bear on the question raised in this case:

"*In re Matheson Brothers, Limited* (1). The head note is:

'The Court has jurisdiction under sec. 199 of the Companies Act, 1862, to wind up an unregistered joint stock company, formed and having its principal place of business in New Zealand, but having a branch office, agents, assets and liabilities in England.

'The pendency of a foreign liquidation does not affect the jurisdiction of the Court to make a winding-up order in respect of the company under such liquidation although the Court will, as a matter of international comity, have regard to the order of the foreign Court.

'It being alleged that proceedings to wind up the company were pending in New Zealand the Court, in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors *pari passu* with those in New Zealand, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company that the English assets should remain *in statu quo* until the further order of the Court.

'*In re Commercial Bank of India* (2), approved.'"

* * * * * *

KAY, J.:—"I think that the Court has jurisdiction to make a winding-up order upon a petition of this kind, otherwise there might be no means by which the English creditors could obtain payment of their debts" (3).

* * * * * *

And at page 230:—

"Had it not been for the fact of a winding-up order existing in New Zealand this Court would, in my opinion, have had jurisdiction to wind up this New Zealand company having an office and carrying on part of its business here as an unregistered company within the terms of the 199th section.

(1) 27 Ch. D. 225. (2) L. R. 6 Eq. 517.
(3) Ibid. p. 228.

"This being the case, what is the effect of the winding-up order which it is said has been made in New Zealand? This Court, upon principles of international comity, would no doubt have great regard to that winding-up order and would be influenced thereby, but the question of jurisdiction is a different question and the mere existence of a winding-up order made by a foreign Court does not take away the right of the Courts of this country to make a winding-up order here, though it would, no doubt, exercise an influence upon this Court in making the order.

* * * * * *

"Having, therefore, jurisdiction to make a winding-up order I feel myself at liberty to sanction the acceptance of the undertaking offered by Mr. Hart. I have said thus much as to my own opinion upon the effect of the Act. But there is the authority of *In re Commercial Bank of India* (2), in which counsel of eminence were engaged on both sides, Mr. Southgate, Q.C., Mr. Bristowe, and Mr. (now Lord Justice) Lindley being for the petitioners, and Mr. (now Lord Justice) Baggallay and Mr. Kekewich for the official liquidator of the new company. There a joint stock company formed in India, registered under Indian law, and having its principal place of business in India, with an agent and a branch office in England, was ordered to be wound up under the Act of 1862, and Lord Romilly said (4) "I think I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money."

Now that case was decided in 1889, and no authority against it has been cited.

In re Commercial Bank of South Australia (5), a bank incorporated in Australia, carrying on business there, and having a branch office in London with English companies and assets in England, it was held the English Court had jurisdiction to make a winding-up order which would be ancillary to a winding-up in Australia. In this case the learned Judge said, "if I have control of the proceedings here, I will take care there shall be no conflict between the two Courts."

I think there is jurisdiction to make this winding-up order, which would be ancillary to the winding-up in Scotland for the purpose of getting in the Canadian assets and settling a list of the Canadian creditors, as *In re Corsellis* (6), the winding-up in England was an ancillary to winding-up in Australia for the same

(4) L. R. 6 Eq. 519. (5) 33 Ch. D. 174.
(6) 33 Ch. D. 160.

purpose, and there need not be, and should not be, any conflict between the two Courts.

In the case of the *Merchants Bank* v. *Gillespie* (7), in the view I took of this case, I considered it quite unnecessary to discuss or decide the question as to the extent of the power of the Dominion Parliament to pass laws for winding-up or otherwise dealing with foreign insolvent trading companies doing business in the Dominion, because I thought the then Winding-up Act, 45 Vic. ch. 23, was not intended to apply to a company incorporated under the Imperial Joint Stock Company's Acts, 1862-1867, and I was confirmed in that opinion by the action of the Dominion Parliament in passing the 1st section of 45 Vic. ch. 39, which repealed the 1st section of 45 Vic. ch. 23, and substituted the 1st section of 47 Vic. in lieu thereof, the only alteration being the addition to the enumeration of the companies to which the 45 Vic. ch. 23 is to apply of the words, " which are doing business in Canada, no matter where incorporated," and " which are insolvent," covering it appeared to me a clear intimation that the 45 Vic. ch. 23, did not so apply. The question now raised in the present case is: Was such addition within the legislative power of the Dominion Parliament, or in other words was such enactment *ultra vires?*

If parliament has legislated respecting strictly foreign corporations, and is not to be considered to be legislating respecting colonial corporations unless they are expressly named, (see *In re Oriental Inland Steam Company* (8), surely it must be said that the Dominion Parliament can in its right to legislate in reference to bankruptcy and insolvency, legislate respecting insolvent companies doing business in Canada, and with reference to property of such companies within its jurisdiction.

Inasmuch then as the Dominion statute declares that the Winding-up Act now applies to all companies which are doing business in Canada and no matter where incorporated, there can be no doubt of the intention of Parliament to apply the Winding-up Act to foreign as well as domestic incorporated companies, and as I think such an enactment is within the legislative power of the Dominion Parliament, and it being admitted that this company was carrying on its business, and held valuable lands in Canada, and was insolvent, and as the provisions of the English Companies Act, 1862, are held to apply to foreign companies carrying on business in England and are worked out as nearly as may be, or

(7) 10 Can. S. C. R. 312. (8) 9 Ch. App. 560.

left not worked out as the exigencies of the case dealt with require and inasmuch as the greater part of the assets of this company would seem to be in Canada, there is the more reason why the property within the territorial limits of the jurisdiction of the Courts of Canada should be dealt with under the provisions of the Canadian Act; in fact it is difficult to see how such property could be dealt with by the English liquidators; and inasmuch as in this case it appears the liquidators under the English Act are acting in concert with the liquidators under the Canadian Act, I can see no reason for supposing that any conflict can possibly arise whereby this stockholder can be in any way damnified; on the contrary, it appears to me that this is the most satisfactory way by which the company can be wound up and its assets realized for the benefit of the company and all the parties interested.

All the Winding-up Act, as I understand it, seeks to do in the case of foreign corporations is to protect and regulate the property in Canada and protect the rights of creditors of such corporation upon their property in Canada. It by no means follows that because all the provisions of the Act may not be applicable to foreign cases that those portions which are should not be acted on.

The fact that liquidation proceedings have already been taken in Scotland under the Imperial Act, and that the Scotch liquidator acquiesces in the present proceedings under the Canadian Act, affords a tolerably good guarantee that there will be no conflict of authority in this case, but whether he acquiesced or not it would be the duty of the Courts of both countries to see no conflict should arise.

STRONG, J.:—In the case of *The Merchants Bank of Halifax* v. *Gillespie* (7) my judgment did not proceed upon the ground that the legislation there invoked was unconstitutional, but I stated as a reason for not adopting the construction there contended for that such an interpretation would give to the statute an effect which would be *ultra vires* of the Parliament of Canada. That case raised the question of the validity of winding-up proceedings under our statute as the sole and principal winding-up of a company registered under the English Act of 1862. I adhere to what I there said as applicable to the principle and original winding-up of such a company to which case my opinion was intended to apply and alone did apply.

In the present case, however, the winding-up order has been granted upon the petition of the liquidator under a liquidation previously instituted under the Act of 1862, in Scotland, and as

ancillary to that principal winding-up. The effect of the winding-up here can therefore only be to entitle the liquidator appointed under it to realize the assets, and after paying creditors (not merely creditors within this jurisdiction, but all creditors) to remit the balance (if any) of the assets to the liquidator in Scotland to be applied and distributed as may there be directed by the proper forum.

In other words this winding-up is subsidiary to the same proceeding which had been previously instituted in the forum of the domicile of the corporation. I am of opinion that an order thus limited as this is authorized by the statute, and that it is entirely within the powers of the Dominion Parliament to confer such a jurisdiction.

The appeal must be dismissed.

The rest of the Court expressed like views.

Winding-up. Canadian and Provincial Companies.

The principles and practice pertaining to winding-up proceedings are to be found in comprehensive statutory provisions and in the large jurisprudence which has grown up around them. There cannot be provided here, in the space available, more than one or two cases indicating the principles to be followed in order to bring any case within the winding-up provisions. In this collection of cases there will be found, in their more appropriate place, a number of decisions upon obligations sought to be enforced in winding-up. They fall more properly under the specific head of the particular subject matter, but at the same time they are illustrative of winding-up rules and principles. Such for instance are:

Winding-up in Case of Insolvency.

Sections 3 and 4 of R. S. Canada, Cap. 144.

3. A company is deemed insolvent,—

(*a*) if it is unable to pay its debts as they become due;

(*b*) if it calls a meeting of its creditors for the purpose of compounding with them;

(*c*) if it exhibits a statement showing its inability to meet its liabilities;

(*d*) if it has otherwise acknowledged its insolvency;

(*c*) if it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay creditors, or any of them;

(*f*) if, with such intent, it has procured the money, goods, chattels, land or property to be seized, levied on or taken, under or by any process of execution;

(*g*) if it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims or,

(*h*) if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure. R. S., c. 129, s. 5.

4. A company is deemed unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. R. S., c. 129, s. 6.

Winding-up. Notice of Application. Evidence of Insolvency.

Re THE QU'APPELLE VALLEY FARMING COMPANY, LIMITED.

1888, 5 M. R. 160.

THE QUEEN'S BENCH, MANITOBA.

Taylor, C.J.:—This is a petition for a winding-up order, presented under the Winding-up Act, R. S. C. ch. 129, by the Scottish-American Investment Company, Limited, who claim to be creditors of the Qu'Appelle Valley Farming Company, Limited. On the argument, counsel for the respondents admitted that they are a trading company subject to the provisions of the Winding-up Act. No affidavit has been filed denying that the petitioners are, as they claim to be, creditors, but the making of an order is opposed on a number of technical grounds. By their charter, the town of Chatham, in Ontario, is named as the chief place of business of the respondents, but it was admitted that this has since been changed to the city of Winnipeg, in this province. The petition for a winding up order is, therefore, under sec. 8, properly made to this Court. The actual business operations of the respondents, while carried on, were mainly carried on in the North-West Territories, in the

Western District of Assiniboia. No business, it is alleged, has actually been carried on by the respondents since some time in the summer of 1886.

The petitioners are the holders of debentures issued by the respondents to the amount of $150,000, and the interest upon these falling due and payable on the 26th of February, 1887, amounting to $4,500, not being paid, the petitioners sued upon the coupons in this Court, and on the 21st of March, 1887, recovered judgment for $4,545.56. Afterwards an action for the same indebtedness was brought in the proper Court in the North-West Territories, and a judgment was recovered there on the 18th of May, 1887. Writs of execution against the goods and lands of the respondents were issued on these judgments to the sheriff of the Eastern Judicial District in Manitoba and to the sheriff of the Judicial District of Western Assiniboia in the North-West Territories, and in both these cases these officers have returned the writs *nulla bona* and *nullæ terræ*. The petitioners having failed to realize the amount due them by process issued on these judgments, now apply for a winding-up order.

At the outset, the objection is taken that no order can be made, or at all events, that no order should be made without notice being first given to the creditors, contributories, shareholders or members. It is urged that as the effect of a winding-up order is, under secs. 16 and 66, to render void executions obtained against the company to be wound up, the Court should know whether there are any such before making an order, which will have the effect of destroying vested rights acquired by creditors under such executions. That sec. 66 corresponds with sec. 83 of the Insolvent Act, 1875, but it was sought to distinguish it, and it was argued that the two cases were different: for under the Insolvent Act, a creditor could apply to have the insolvency proceedings set aside, while he can make no application to set aside a winding-up order. Now that is scarcely correct. There may be such a provision in the Insolvent Act, though I have been unable to find it, but sec. 18 of the Winding-up Act does provide that the Court may, at any time after a winding-up order is made, upon the application of a creditor or contributory, make an order staying the winding up, either altogether or for a limited time. The proceedings in *Clarke* v. *Union Fire Insurance Company* (1) were on the application of a shareholder to discharge the winding-up order. The proceedings may, under sec. 8, be taken upon notice to the company, although under sec. 20 a liquidator cannot be appointed unless notice is given to the creditors, contributories, shareholders or members. In *Clarke* v. *Union Fire*

(1) 10 O. R. 489.

Insurance Company (1), Proudfoot, J., said, notice need be given to the company only, and perhaps also to creditors who have brought actions against the company and whose actions would be stayed by the winding-up order. Burton, J.A., in *Re Union Fire Insurance Company* (2) thought it reasonably clear that it was not the intention of the Legislature that any winding-up order should be made until notice had been given to the creditors, contributories, members and shareholders. Paterson, J.A., was, however, in the same case of a different opinion. "It is, he said, at p. 282, "worth while to note particularly that the notice required by sec. 24 (now sec. 20) is notice of the intention to appoint a liquidator, not notice that a winding-up order is applied for. The only notice prescribed for that proceeding is the four-day notice to the company under sec. 13 (now sec. 8). It may, therefore, be questionable whether it is contemplated by the statute that a creditor or contributory attending on a notice under sec. 24 (now sec. 20) shall be heard to object to a winding-up order being made, even if that proceeding stood by adjournment for the same day. He certainly could not appeal to the language of the statute in support of such a claim. . . It should also be borne in mind that the notice to the company required by sec. 13 (now sec. 8) is notice to the directors or others who represent the joint interests of the members of the corporate body, and may reasonably be taken to be, as the Legislature in sec. 13 treats it, as sufficient notice of the application for the winding-up order; while, when the separate interests of individuals or classes are involved, as they may be in the choice of a liquidator, notice of a different kind, such as that required by sec. 24 (now sec. 20) becomes necessary." Mr. Justice Osler agreed with the view taken by Paterson, J.A. It seems to me that the plain words of the statute are against the objection.

In dealing with the question of whether an order should or should not be made, it does not seem to me that assistance can be derived from the English cases cited, which lay down that where the creditor cannot obtain payment without a winding up, then the order is to be made *ex debito justitiæ*. The English Act contains words not found in the Canadian Act, and in England an order may be made "Whenever the Court is of opinion that it is just and equitable that the company should be wound up." With us, the case must be brought within the terms of the statute.

By sec. 3, the Act applies to the classes or kinds of companies there mentioned—(*a*) which are insolvent, or (*b*) which are in liquidation or in process of being wound up. The respondents have not been doing business for nearly two years, but I do not think they

(2) 13 O. A. R., at p. 272.

are in liquidation or in process of being wound up within the meaning of that section. Are they then insolvent? A number of cases were cited as to the meaning of the word insolvent, but it seems to me that, for the purposes of this Act, the word insolvent is defined by sec. 5, and that only can be looked at. That sec. 5 says a company is deemed insolvent if any one of eight different things has happened. No effort was made to make out the respondents as insolvent on account of three of these, being clauses (*b*), (*c*) and (*f*). It was sought to make all the others applicable.

By sec. 5, clause (*a*), a company is deemed insolvent "If it is unable to pay its debts as they become due." Section 6 then declares when it is that a company is to be deemed unable to pay its debts as they become due. It is to be so whenever a creditor for a sum exceeding $200 then due serves on the company in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum due and the company has for sixty days neglected to pay such sum or to secure or compound for the same to the satisfaction of the creditor. In the present case, a demand in writing was served upon two directors of the company and the debt claimed has neither been paid, secured or compounded. But such service was not service, in the manner in which process might legally be served on the company in the place where service was made. The service of process in this province upon corporations is provided for by sec. 41 of the Queen's Bench Act, 1885, and it may be served "on the mayor, warden, chairman, reeve, president, or other head or chief officer * * * or on the cashier, treasurer, manager, secretary, clerk or agent of such corporation or of any branch or agency thereof in the Province." Directors are not named among the persons who may be served. Then it appears from an affidavit filed that Mr. Eberts, the secretary-treasurer of the company, who was one of the persons upon whom service of process might legally have been effected, was living in the city and was actually in the city at the time service of the demand was made. It is urged that under sec. 42, the Court has power to order substitutional service or to homologate previous service, and that an order might and should now be made homologating the service effected upon the directors. I do not see how such an order can be made, for the Court will never make an order for substitutional service or homologating a service effected upon a person other than one who primarily ought to be served when it is not shewn that there could be any difficulty in serving him, and here Eberts, the person, could have been served, clearly then the respondents are not brought under clause (*a*).

It is, however, sought to bring them within clause (*d*) and it is urged that the company has acknowledged its insolvency, by not paying the debt, allowing itself to be sued, judgment to be recovered and executions to be returned *nulla bona*. I do not think so. These are all circumstances from which perhaps a state of insolvency might be inferred, but that is not what the statute means by acknowledging its insolvency. To bring a company within the clause, there must, I think, be something actively done by it as an acknowledgment. This seems plain from the clause, standing as it does immediately after two other clauses saying a company is deemed insolvent "If it calls a meeting of its creditors for the purpose of compounding with them. If it exhibits a statement shewing its inability to meet its liabilities." Then comes the clause, "If it has otherwise acknowledged its insolvency."

Neither has the company been brought within clause (*e*). It is sworn that an assignment or transfer of the property of the company to the Bell Farm Company was made, to defraud, defeat or delay its creditors; but that is not the way in which to prove a fraudulent transfer. The facts should be stated, and then it is for the Court to say whether, upon these facts, the transfer was, or was not, of that character.

Clause (*g*) provides that the company is to be deemed insolvent "If, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or main part of its stock-in-trade or assets without the consent of its creditors, or without satisfying their claims." The affidavits here are that the company has never set apart out of profits, the amount which the by-law under which the debentures were issued required to be set apart annually as a sinking fund. Also, that in 1886, the company assigned and transferred to the Bell Farm Company all their property, real and personal, and have never since carried on any business. It is also sworn that at the time of such transfer the company was unable to meet its liabilities in full, and the transfer was made without the consent of its creditors and without satisfying their claims. It is objected that the affidavits do not shew sufficiently the means or sources of knowledge of the deponents. The affidavits are made by the solicitors for the petitioners, who swear they have been acting as the agents of the petitioners, since March, 1885, in looking after their claim against the respondents under the debentures in question. The sources of their information are stated to be conversations as to the position and affairs of the company with the president, secretary-treasurer, and general manager. One of the solicitors says further, that the Bell Farm Company, to which the respondents made the transfer

in 1886, and which it is said has since carried on the business previously carried on by the respondents, in 1887 obtained from the petitioners a loan to enable it to carry on operations, and he for a time acted as a director of that company for the purpose of looking after the interests of the petitioners, and while so acting he became familiar with the affairs of the Bell Farm Company, and incidentally with the affairs of the respondents also. *Re Fortune Company* (3) was a case in which the petitioners were resident in Australia. The rule of Court required an affidavit from the petitioners, to be sworn and filed within four days after the petition was presented, and as this could not be complied with an application was made to have this statutory affidavit dispensed with. The Vice-Chancellor thought the proper course would be to apply to the Lord Chancellor, and accordingly an application was made to Lord Hatherley and Lord Justice Giffard. They said, that if an affidavit were filed by some person deposing from his own knowledge and not merely to his belief, as to the facts stated in the petition, such affidavit might, under the circumstances be admitted as sufficient. Thereupon the solicitor made an affidavit as to the company having ceased to carry on business, being involved in debt, having no money and having expended their capital, and that he had learned these facts from the secretary of the company. The evidence was considered sufficient. The affidavits here go quite as far, if not further, than that, and I think I should hold them sufficient, especially where there is no contradiction of the facts sworn to, indeed, no attempt to contradict them, although the secretary-treasurer, one of the persons with whom the conversations are said to have taken place, has filed two affidavits on other points.

That executions have been issued and returned *nulla bona* does not bring the respondents within the letter of clause (*g*), which speaks only of a company permitting an execution under which a seizure has been made to remain unsatisfied, but certainly it is within the spirit of that clause. In England, under the Companies Act, 1862, sec. 80, sub-sec. 2, a company cannot be deemed unable to pay its debts unless the judgment creditor petitioning has actually issued execution and such execution has been returned unsatisfied in whole or in part. In *Re Flagstaff, etc., Company* (4), no execution had been issued, because the solicitor of the company told the creditor there was no property of the company on which he could levy, and that it was held relieved the creditor from the necessity of actually levying. So, although in England service must be made at the registered office of the company. Where that had been pulled

(3) L. R. 10 Eq. 390. (4) L. R. 20 Eq. 268.

down, service at another place was, in *Re Fortune Company* (3), held to be sufficient.

The case is, however, within the terms of clause (*g*) and I must hold on the evidence that the company, when unable to meet its liabilities in full, made a conveyance of the whole or main part of its stock-in-trade or assets without the consent of its creditors and without satisfying their claims, and is, therefore, subject to have an order made for winding it up.

As notice has not yet been given to the creditors, contributories, shareholders or members, a liquidator cannot be appointed, and that must be done when the winding-up order is made. I make no order at present, but adjourn the consideration of the petition for such a time as will admit of notice being given.

Winding-up. Evidence of Insolvency under the Act.

IN RE EWART CARRIAGE WORKS, LIMITED.

1904, 8 O. L. R. 527.

MAGEE, J.

This was a petition by the Dunlop Tire Company for an order for the winding up of the Ewart Carriage Works, Limited, under the Dominion Winding-up Act.

MAGEE, J.:—This company is a trading company, incorporated, under the Ontario Companies Act, on February 19th, 1903, among the objects of the company being to acquire the business of Mr. James Ewart.. The nominal capital is $100,000, in 1,000 shares, of which 294 shares were subscribed, and 133 shares are paid up. Of the $16,100 owing upon subscribed shares, a sum of $500 is said to be owing from one director, $400 from another, $15,000 from Mr. James Ewart—described as manager, who holds 250 shares—and it is alleged by the petitioners that another shareholder, Mr. Burlis, described as "secretary," really subscribed for $3,000 of stock, although only appearing as holder of $1,000 fully paid, and that $2,000 is owing upon that subscription.

The petitioners, the Dunlop Tire Company, are judgment creditors for $205.84, made up of $193.97 debt and $11.87 costs—their judgment being recovered on July 9th, 1904.

The petitioners allege that a writ of *fi. fa.* was issued on July 9th, 1904, under their judgment, and that the Ewart Company permitted the execution so issued against them, and under which their goods, chattels, lands and property were seized to remain unsatisfied for more than fifteen days after seizure of such goods by the sheriff, and that the judgment and execution is wholly unsatisfied, and that the Ewart Company are unable to pay their debts as they become due.

[The learned Judge then referred to other allegations in the petition not material to this report, and continued:]

On the facts disclosed in the affidavits, I would consider it desirable in the interests of the outside creditors that a winding-up order should issue. The amounts owing from two or three directors, the claim of another, the mortgage without authority from shareholders, and the absence of available assets so soon after the company's organization, are circumstances which render it reasonable for creditors to ask that the control of the company's affairs be not left with the directors.

The question is, have the petitioners shewn sufficient ground, as required by the Winding-up Act, R. S. C. 1886, ch. 129, for granting their petition.

Counsel for the petitioners claimed that they were entitled to an order under clauses (a), (d), (g), and (h) of sec. 5 of the Act.

As regards clauses (d) and (g), even if there were proof of facts to bring the company within either, there is no allegation of such facts in the petition, not even a general allegation of insolvency of the company, but only of particular facts not coming under either of those two clauses.

In *In re Wear Engine Works Co.* (1), an order was refused upon that ground; and see also *In re Briton Medical and General Life Association* (2), and *Re Grundy Stove Co.* (3).

As to clause (h), there is here no evidence of a seizure. The petition alleges a seizure, but the solicitor's affidavit only states that the sheriff informed him he proceeded to make a seizure, but found that all the goods, etc., were claimed under a mortgage, and his return must be *nulla bona*. This would rather imply that no seizure was in fact made; but, even if this proceeding to make a seizure could be interpreted as the making of one, there is nothing to shew when it took place or that fifteen days had elapsed. The secretary's

(1) (1875), L. R. 10 Ch. 188. (2) (1886), 11 O. R. 478.
(3) (1904), 7 O. L. R. 252.

affidavit verifying the petition in general terms on information and belief cannot be taken as sufficient, especially as the sources of the information are given, and manifestly do not relate to that fact.

As to clause (a) of sec. 5, the petition makes a direct allegation under that clause of the company's inability to pay its debts as they become due, but no evidence is given of a demand in writing, and neglect by the company to pay within sixty days thereafter, as required by sec. 6, which specifies when the inability to pay debts shall be deemed to exist. In *Re The Qu'Appelle Valley Farming Co.* (4), and *Re Rapid City Farmers' Elevator Co.* (5), it was held by Taylor, C.J., that sec. 6 specifies the only way of bringing the case under clause (a) of sec. 5, a view apparently taken also by Proudfoot, J., in *Re Briton Medical and General Life Association* (6), and in which I concur.

In England other proof is sufficient, as sec. 80 of the Companies Act (1862), 25-26 Vict. ch. 89, only requires it to be to the satisfaction of the Court.

On the petition as it at present stands, and with the present proof, I do not see my way to grant an order; but as it appears to be a case in which the company should be wound up, the petitioners may, if they so desire, amend the present petition, and offer such additional evidence as they may be advised, and again present it within fourteen days.

Winding-up. Necessity for Proof of Insolvency.

RE GRUNDY STOVE COMPANY.

1904, 7 O. L. R. 252.

MEREDITH, C.J.

Petition by shareholders to wind up the company under the Winding-up Act (Dominion) on the ground that the company was insolvent.

MEREDITH, C.J.:—The material filed in support of the petition does not bring the case within section 5, but the company appears

(4) 5 Man. L. R. 160. (5) 9 Man. L. R. 574.
(6) 11 O. R. 478.

upon the motion and admits its insolvency and consents to the winding-up order being made, and the question is whether in these circumstances it should be made.

A winding-up order has or may have an important effect upon the rights of shareholders and others not parties to the proceedings.

The winding-up of the business of the company is deemed to have commenced at the time of the service of the notice of presentation of the petition for winding-up (section 7).

Transfers of shares, except transfers made to or with the sanction of the liquidators under the authority of the Court, and every alteration in the status of the members of the company after the commencement of the winding-up are void (section 15 (2)), and the periods mentioned in sections 68 to 73 inclusive, which deal with fraudulent preferences, are computed from the commencement of the winding-up.

Having regard to these considerations, it appears to me that the order ought not to be made in this case and that the petition should be dismissed.

Re Flagstaff Silver Mining Co. of Utah, (1) and *Re Yate Collieries and Limeworks Co.* (2); irrespective of the fact that the admission which was received as evidence of insolvency was made before the proceedings were taken, are distinguishable, because under the English Act proof of the company's inability to pay its debts is sufficient to warrant the making of the winding-up order, while under our Act the company must have exhibited a statement shewing its inability to meet its liabilities, 5 (*c*), or otherwise acknowledged its insolvency, 5 (*d*), and neither of these things is shewn to have happened.

The motion is refused without prejudice to a new petition being presented.

(1) (1875), L. R. 20 Eq. 268. (2) (1883), W. N. 171.

Winding-up. Discretion of Court as to Making Order.

RE MAPLE LEAF DAIRY COMPANY.

1901, 2 O. L. R. 590.

BOYD, C.

Petition by a creditor for the winding-up of the company under the Dominion Act.

BOYD, C.:—This is a comparatively small concern, incorporated 13th June, 1901, and making assignment for benefit of creditors on 15th October, 1901. Capital stock $10,000 in 400 shares of $25 each; of these 67 have been subscribed for, of which 29 were allotted as fully paid up in purchase of a private dairy business, the details of which are disclosed to the public by papers filed in the office of the Provincial Secretary.

On the remaining 36 shares taken there is a balance outstanding of $316. They were subscribed to be paid for in cash, and it is on affidavit stated and not denied that there will be no difficulty in realizing payment of these unpaid balances of stock.

Leaving out a claim of $3,000 odd of the Canadian Supply Company, for which they are willing to take in satisfaction a certain property of about equal value on which they have security, the liabilities are $3,108 and the assets $1,896.

Under the assignment the first meeting of creditors was held at Ottawa on the 28th October, at which a statement of affairs was fully given by the assignee. It was attended by almost all the creditors, who confirmed the appointment of the assignee, and appointed five inspectors of special competence.

The present petitioning creditor then filed his claim, and no objection to the proceedings was made by his solicitor.

The shareholders and the creditors as a whole, some 35, with the sole exception of the applicant, are content and desirous that the proceedings to liquidate should be continued and closed under the existing assignment.

Judgment was obtained on the same 28th October by the petitioning creditor for $201, a sum just sufficient to give him a status under the Winding-up Act. Another judgment was obtained by another creditor, Osborne, on the 9th October, who accedes to the

prosecution of the assignment, and was appointed one of the inspectors.

The petitioner takes his stand on *Re William Lamb Manufacturing Co. of Ottawa*, (1) and says his right to an order is *ex debito justitiæ*. There are dicta in that case disagreeing with the prior decision of *Wakefield Rattan Co.* v. *Hamilton Whip Co.* (2) I am unable to hold as indicated by Meredith, C.J., that the Court has no discretion in granting or withholding the order asked for under sec. 9 of the Winding-up Act. (3) The Court has to look not merely at the one creditor who applies, but at the body of creditors, who have the main interest in the assets, and ascertain, if it can, their attitude. In the case of a small affair like this, it would be most unfortunate if the costs were to be in part duplicated, and as to the balance increased by the more elaborate proceedings under the Dominion statute. I think the applicant, so far as dividend is concerned, will fare better under the method of realization now in operation than would result by means of compulsory liquidation.

In *In re Haycraft Gold Reduction, etc., Co.* (4) Cozens-Hardy, J., says: "The existence of a voluntary winding-up is a strong reason why the Court should decline to interfere" [by granting a compulsory order], "but circumstances may justify interference. The most common instance, no doubt, is where the Court holds that the resolution to wind up voluntarily has been passed fraudulently, but that is not exhaustive." No imputation of fraud or collusion is here made.

No doubt, a creditor is entitled, having brought himself within the conditions of the Act R. S. C. ch. 129, to have the company wound up by the Court as a general rule; but there are several exceptions to this, one of which arises where there would be no tangible advantage to the creditor in directing a compulsory liquidation; and another is where the creditors have almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act.

The distinction is succinctly made in *In re West Hartlepool Ironworks Co.* (5), that, though the applying creditor may be entitled to a winding-up order *ex debito justitiæ* as against the company, he is not so entitled as against the wishes and opposition of all the other creditors. This is the present case—the great body

(1) (1900), 32 O. R. 243. (2) (1893), 24 O. R. 107.

(3) 9. The Court may make the order applied for, may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order that it deems just.

(4) (1900), 7 Mans. 243, at p. 249. (5) (1875), L. R. 10 Ch. 618.

of creditors are content with and are proceeding under the voluntary assignment—this one creditor seeks to superinduce upon that the extra expense of proceedings under the Dominion statute. The estate is small and cannot stand much depletion for costs, and, in my opinion, the interests of the creditors are best served by letting the assets be administered as they propose. The observations of Mr. Justice Kay in *In re New York Exchange* (6), are not without pertinence to this company: see *In re Greenwood & Co.* (7).

I make no order in the present case, but refuse without costs, as *Re William Lambe Manufacturing Co. of Ottawa* (1) justified the application. For like reasons I would give leave to appeal if security for costs is given by the applicant, who resides in Quebec.

It is a case in which the respondents should be allowed to add their costs to their claims.

Winding-up. Effect of Order upon Subsequent Action by and against Company or Shareholders.

SHAVER v. COTTON.

1896, 23 O. A. R. 126.

THE COURT OF APPEAL, ONTARIO.

The plaintiff was a judgment creditor of the Tribune Printing Company, a company duly incorporated under the Ontario Joint Stock Company's Letters Patent Act, R. S. O. ch. 157, and on the 3rd of April, 1894, on his application, an order was made under the Dominion Winding-up Act, R. S. C. ch. 129, declaring the company insolvent, directing that it should be wound up, and referring the matter to the Master in Ordinary, and on a subsequent application by the plaintiff a liquidator was appointed. No further step was taken in the winding-up proceedings, and no the 13th of June this action was commenced against the defendant as an alleged contributory asking payment of the amount due on his stock, in accordance with the provisions of sec. 61 of the Ontario Joint Stock Company's Letters Patent Act, R. S. O. ch. 157. The defendant pleaded the winding-up order as a bar to the action.

(6) (1888), 39 Ch. D. 415, at pp. 417, 419.
(7) (1900), 7 Mans. 456.

The Queen's Bench Division gave judgment for the plaintiff for the amount unpaid on the stock.

Defendant appealed.

HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A., delivered written judgments that the appeal be allowed.

MACLENNAN, J.A.:—With great respect, I think this appeal should be allowed. The question is whether a winding-up order is a defence to an action by a creditor of a company under sec. 61 of the Ontario Joint Stock Companies Letters Patent Act against a shareholder who has not paid up his stock in full. The action was brought against the shareholder after the making of a winding-up order and the appointment of a liquidator under the Dominion Winding-up Act, R. S. C. ch. 129, and I think the winding-up order is a defence.

The judgment of the Divisional Court proceeds upon the absence from the Winding-up Act of any section corresponding to sec. 198 of the English Companies Act prohibiting actions against contributories after an order is made for winding-up, and the absence of any provision which can be properly construed as creating such a prohibition. With great respect, I think the bringing of such an action is contrary to the whole scope and intent of the Winding-up Act. Unpaid stock is an asset of the company, and the moment a winding-up order is made, that unpaid stock has, in effect, been appropriated for rateable distribution among the creditors of the company. The order is, in effect, a judgment of a competent Court making such an appropriation, and it is binding on the company and also upon all the creditors and shareholders, and the object of the present action is to have the unpaid stock paid and applied contrary to the terms of that judgment. The winding-up order requires that the stock shall be applied to the payment of all creditors without preference or priority, while the action seeks to have it paid exclusively to the plaintiff. There are many sections of the Winding-up Act which, in my judgment, shew clearly that the action cannot be maintained. Section 17 declares that "Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void." The present action is in the nature of a proceeding to have execution against the company's assets, that is, the unpaid stock, and I think the creditor who has recovered judgment against the company has no more right to issue a *sci. fa.* against a shareholder than to issue an execution against the company's goods. Section 30 requires the liquidator to take into his custody or under his control all the property, effects and choses in

action to which the company is or appears to be entitled; sec. 39 forbids any action, suit, attachment, seizure, or other proceeding of any kind whatever for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, other than by an order of the Court on summary petition; secs. 42, 43, 44, and subsequent sections, shew how the unpaid stock of the shareholders is to be recovered and applied under the winding-up; and the concluding part of sec. 44 is express that the unpaid stock is to be deemed an asset of the company, and a debt due to the company, and payable as directed or appointed under the Act. And again, sec. 66 in effect prevents the enforcement of any judgment against the company's assets by any execution, levy, or seizure, garnishee order, or other process or proceeding if before payment over to the plaintiff of the money the winding-up has commenced, with the single exception of any lien or privilege for costs.

I think all these sections of the Act leave no room for the contention that the present action could properly be commenced or proceeded with against the defendant as a shareholder of the company. The respondent, however, relied upon sec. 90 of the Act, which declares that the powers conferred by the Act on the Court are in addition to and not in restriction of any other powers subsisting either at law or in equity of instituting proceedings against a contributory or the estate of any contributory for the recovery of any call or other sums due from him or his estate, and such proceedings may be instituted accordingly. I do not think this section at all assists the respondent or supports the judgment. It is evident that this section has no reference to any action or proceeding by or on behalf of a creditor, but to actions or proceedings in furtherance of the winding up. It would probably apply, for example, to the case of a deceased contributory or debtor of the company whose estate was not sufficient to pay all creditors in full. In such a case, it might be necessary for the liquidator, either in his own name or in the name of the company, to obtain judgment or order for the administration of the estate of the deceased person, instead of endeavouring to recover the debt, or a rateable share of it, by summary order, as in other cases.

I ought to add that, in my opinion, the absence of any provision similar to sec. 198 of the Companies Act in England can have no effect in qualifying the operation of the sections of our own Act to which I have referred.

I am, therefore, of opinion that the appeal should be allowed, and that the action should be dismissed with costs.

Appeal allowed.

Winding-up. Leave to Proceed against Company in Liquidation. When Permissible.

RE LAKE WINNIPEG TRANSPORTATION LUMBER AND TRADING COMPANY, LIMITED, PAULSON'S CLAIM.

1891, 7 M. R. 602.

TAYLOR, C.J.

TAYLOR, C.J.:—Some time ago, an order was made, under Rule 59, of the Rules under the Winding-up Act appointing Thompson, Codville & Co., and Turner, McKeand & Co., to represent the creditors, in and about the proceedings relating to the winding up. This rule is the same as the English Rule 61, except that the English rule says the person so appointed is to represent the creditors "at the expense of the company," while rule 59 says, "at the expense of the company or otherwise as shall seem proper." By the order made in this matter, the question of costs was reserved. The question of costs has now been spoken to by counsel for the creditors and the liquidator. The creditors appointed take the position that, while they are ready to bear any costs incurred by the appearance of counsel or of a solicitor on their own behalf and in connection with matters which affect their interests, they are not willing to incur personal liability for the costs of the attendance of counsel or a solicitor in the general interests of the creditors as a body.

I am not aware of any decision on the question of the costs of a creditors' representative in this province or in Ontario. In England, the cases on the subject are by no means consistent or satisfactory.

In Emden's Law of Companies, it is said, at p. 119, "Except in special cases, the costs of the appearance of a creditors' representative will not be allowed." In *Aston's Case* (1), a witness was ordered to attend and be examined at his own expense, and from this order he appealed, the appeal being dismissed with costs. The creditors' representative had not been served with notice of the appeal, but counsel appeared for him and asked for costs, submitting that it was his duty to attend. The Lords Justices directed that he should have the costs of his appearance out of the estate.

(1) 4 D. & J. 320.

Hyam's Case (2) was an appeal by a person placed on the list of contributories. Counsel for the creditors' representative appeared, as well as counsel for the general manager, and the appeal is said to have been dismissed with costs, including those of the creditors' representative, but it is not said whether these were to be paid by the appellant or out of the estate.

Re Saxon Life Assurance Co. (3) was an adjourned summons by the official manager of the Era Co., to establish a debt claimed to be due that company, but the claim was disallowed. Counsel for the official manager submitted that the creditors' representative of the Era Co. was not entitled to appear, and ought to have no costs. He said it had been decided that he might appear to resist a claim against the official manager, but he had never been allowed to appear to support a claim which the official manager made. On the other side, it was argued that the creditors' representative had always a right to appear on a claim affecting the assets. Page Wood, V.-C., said, it seemed to be decided that the creditors' representative was entitled to appear in Chambers on any claim of this kind, and he must hold him equally entitled when the summons was adjourned into Court; his costs must, therefore, be allowed.

In *Ex parte Budd* (4), Budd appealed against an order placing his name on the list of contributories. Counsel appeared for the official manager and for the creditors' representative, though he had not been served with notice, and the appeal was dismissed with costs. Counsel for the appellant and for the official manager opposed his getting costs, because he had appeared voluntarily, and the interests of the official manager and the creditors were identical, so he ought to have allowed the official manager to fight the battle. Knight Bruce, L.J., said: "The costs of the creditors' representative must be borne by the estate," and Turner, L.J., said, "The Legislature has put the creditors' representative in the place he occupies for the benefit of the creditors, and the contributories must take the consequences. His costs must be paid out of the estate."

In *Ex parte Cotterell* (5), the official manager appealed from an order removing a name from the list of contributories. The creditors' representative did not join in the appeal, but appeared to support it. The appeal was dismissed with costs to be paid by the official manager who was to reimburse himself out of the estate. As to the creditors' representative, Knight Bruce, L.J., said, he thought only a small definite sum could be allowed him out of the

(2) 1 D. F. & J. 75.
(3) 2 J. & H. 408.
(4) 31 L. J. Ch. 4.
(5) 32 L. J., Ch. 66.

estate, as there was no reason why he should not have concurred in the official manager's appeal, and he allowed £5 5s.

In *Ex parte Anchor Assurance Co.* (6), a question came before Page Wood, V.C., which he adjourned from Chambers into Court. He allowed the creditors' representative costs, treating the matter as if disposed of in Chambers and declining to certify that it was a proper one for counsel. Against this, the creditors' representative appealed, and the Lord Justices, though they dismissed the appeal, thought it a proper matter to bring before them. Turner, L.J., expressed himself thus, "It seems to me right as a general rule (although it is, of course, impossible to lay down a general rule applicable to all cases and all circumstances) that where the creditors and the contributories have common and equal interests, the creditors' representative ought not to appear on the application, but should leave the case in the hands of the official manager. Where any question arises between the creditors and the contributories, then the application is properly attended, both by the creditors' representative and the official manager, one representing the creditors, and the other the contributories. "But in *Re British Provident Life Society* (7), where the official manager learned that a name should be retained on the list of contributories and the creditors' representative appeared to support his contention, Kindersley, V.C., although he struck the name out, gave both their costs out of the estate.

These were all matters in which there was an official manager appointed under Imp. Act, 11 & 12 Vic. ch. 45, whose position seems to have been somewhat different from that of an official liquidator under more recent Acts, as he appears to have represented only the company. But *Re Overend, Gurney & Co.* (8) was a case under the Act now in force in England, and of which our Act is largely a copy. In that matter, motions by several contributories to have their names removed from the list were refused. The creditors' representative appeared to support the contention of the official liquidator that they should not be removed, and asked for his costs. Malins, V.C., said he would not make the contributories liable for these costs, "but, as Kindersley, V.C., made an order that Mr. Oppenheim should represent the creditors, and as it appears to me a right thing that the creditors should have a representative, because, although, in a certain sense, the official liquidators do represent them, still they cannot be expected to have that active interest in their behalf which they would in their own behalf, I

(6) 32 L. J. Ch. 215. (7) 32 L. J. Ch. 633.
(8) L. R. 3 Eq. 634.

think they should have their costs, but they should come out of the estate." In *McIver's Claim* (9), an appeal against an order declaring the claim was not a preferential one was dismissed, and the creditors' representative asked for costs, which were refused. Counsel then relied upon an order which had been made under rule 61, and Giffard, L.J., said: "As you appear under the authority of an order, I shall give you the costs of your present appearance out of the estate, but I shall discharge that order as leading to needless expense." Counsel remarking that there was no application to discharge the order, the Lord Justice replied: "But I can discharge it, and I shall do so without prejudice to any application you may make when there is any special question on which the appearance of some one to represent the creditors is desirable." With all respect to the Lord Justice, this seems an extraordinary order to have made. How would the creditors' representative receive notice of any question coming up specially affecting the interests of creditors, or how could he make any application to be heard on such question when the order under which alone he had any authority to appear for or represent the creditors had been discharged?

In both these cases, the existence of an order appointing a creditors' representative seems to have been considered a sufficient reason for giving him his costs out of the estate. But there can be no doubt matters will from time to time be brought before the Court by the official liquidator, upon which there need be no attendance by the creditors' representative. I do not, however, think that the mere fact of the interest of the creditors and the official liquidator being identical should be a reason for refusing costs. Even in such a case, the matter brought up may be so important in the interests of the creditors that their representative may well attend to support the argument of the liquidator and to urge before the Court all that can be said for the creditors. In the *Adansonia Fibre Co.* (10), the Vice Chancellor refused to hear the creditors' representative because the liquidator sufficiently represented them, but the order he made adversely to the creditors was reversed on appeal. Probably had he heard counsel for the representative, the cost of an appeal might have been saved. While it may be that the cost of an attendance by the creditors' representative should not be allowed in every matter which comes up, I think he should be liberally dealt with and his costs should be allowed whenever it is not undoubtedly an unnecessary attendance. Having one person to represent the body of creditors—whose costs are paid out of the estate—must be a great saving of expense to the individual

(9) L. R. 5 Ch. 421. (10) L. R. 9 Ch. 637.

creditors, rendering the employment of a solicitor or counsel by each of them unnecessary. The Court, too, has the benefit by such representation of learning the views of the creditors and not merely those of the liquidator. I do not see, however, that an order can be made to allow costs of an attendance by the creditors' representative on every occasion of a matter being brought before the Court. The solicitor acting for the representative must exercise a discretion as to the matters upon which he will attend and where costs should be allowed. It will be well for the judge to note that at the time, so that difficulties may not afterwards arise on taxation.

In this matter, the only attendance by the creditors' representatives since their appointment has been in connection with the question whether the liquidator should call for an assignment and delivery of the securities held by encumbrancers on the steamer Aurora; and the costs of this should be allowed.

Responsibility of Company for Tortious Act of Agent within Scope of Employment.

WHITFIELD v. SOUTH-EASTERN RAILWAY COMPANY.

1858, 27 L. J. Q. B. 229.

THE COURT OF QUEEN'S BENCH.

The first count of the declaration stated, in substance, that the plaintiffs were bankers at Lewes, with branch banks at other places, constituting together the Lewes Old Bank; that they had issued large quantities of notes, which were in circulation and outstanding; that they had large sums of money in their hands, which had been deposited and lent to them by customers, who were entitled to draw cheques upon the said Lewes Old Bank, and that the said bank had never stopped payment or been insolvent; that the defendants were the proprietors of and managed and conducted a system of electric telegraph upon their line of railway, extending between the Ticehurst Road station and the Hastings station, and between London Bridge station and the said Ticehurst Road station, and divers other stations on the said railway, for the purpose of enabling them to transmit messages, and that they did transmit messages, and had the care and custody of all the messages transmitted, yet the defendants, while, &c.,

falsely and maliciously, by means of the said telegraph transmitted and sent and published from the Ticehurst Road station to the Hastings station, and there falsely and maliciously caused to be published the false, malicious and defamatory words and message following, of and concerning the plaintiffs, and of and concerning them as such bankers as aforesaid, and such proprietors and managers of the said Lewes Old Bank, and of and concerning the said Lewes Old Bank, that is to say, "The Lewes Bank," thereby meaning the said Lewes Old Bank, "has stopped payment," thereby then and there meaning and intending that the said bank and the plaintiffs as such proprietors thereof as aforesaid, were insolvent and had ceased to pay, and were unable to pay their said notes, and the other demands upon them, and that the creditors of the said bank would be delayed and otherwise prejudiced in obtaining the amount of their claims from the said bank.

The declaration contained several other counts, charging the defendants with the publication of other libels of the same nature.

Lord Campbell, C.J., now delivered the judgment of the Court:—The demurrer to the declaration in this case can only be supported on the ground that the action will not lie without proof of express malice as contradistinguished from legal malice. But if we yield to the authorities, which say, that in an action for defamation, malice must be alleged (notwithstanding authorities to the contrary), this allegation may be proved by shewing that the publication of a libel took place by order of the defendants, and was, therefore, wrongful, although the defendants had no ill-will to the plaintiffs, and did not mean to injure them. Therefore, the ground upon which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying, that under certain circumstances express malice may not be imputed to and proved against a corporation. The authorities are collected and commented upon in *The Queen* v. *The Great North of England Railway Company* (1), in which it was held that a corporation aggregate may be indicted for cutting through and obstructing a public highway; and, again, in *The Eastern Counties Railway Company* v. *Broom* (2), in which it was held, in error, that an action

(1) 9 Q. B. Rep. 315; s. c. 16 Law J. Rep. (N.S.) M. C. 16.
(2) 6 Exch. Rep. 314; s. c. 20 Law. J. Rep. (N.S.) Exch. 196.

of trespass may be maintained against a corporation aggregate for an assault committed by their servant authorized by them to do the act. The cases to the contrary will be found to turn upon the defective evidence to prove the authority of the corporation to do the act complained of. Instances might easily be suggested, where a great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed. Therefore, without adverting to the second point made by the defendant's counsel, that, at any rate, some of the counts impute negligence to the defendants in the mode of working their telegraph, we think that there ought to be judgment for the plaintiffs.

Judgment for the plaintiffs.

CITIZENS' LIFE ASSURANCE COMPANY, LIMITED v. BROWN.

L. R. 1904. A. C. 423.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Appeal from a decision of the Supreme Court of New South Wales refusing to order a new trial or to set aside a verdict for £650 damages obtained by the respondent against the appellants in an action for libel. The facts sufficiently appear in the judgment of the Board.

Lord Lindley delivered the judgment of their Lordships.

Lord Lindley:—The question raised by this appeal is whether a limited company is responsible for a libel published by one of its officers. The action has been tried three times. The plaintiff obtained a verdict and judgment every time, with damages which have been every time increased. Counsel for the company feel that it would be useless to send the case back for another trial, and they therefore ask that the last verdict and judgment should be set aside and judgment entered for the company.

The facts are shortly as follows:—

The appellants are an assurance company incorporated with limited liability, and carrying on business in New South Wales.

From January, 1900, until June, 1900, the respondent Brown (the plaintiff in the action), was in the service of the company as an insurance agent at Tamworth. Brown was introduced to the company by Fitzpatrick, who was employed by the company as a superintendent of agencies under the terms of an agreement dated June 12th, 1899. His duties will be referred to presently. Shortly after leaving the employment of the company, namely, in the month of July, Brown entered the service of a rival company called the Standard Life Association, and while in the service of such company Brown visited divers of the policy-holders in the appellant company, and endeavoured to induce such policy-holders to leave the appellant company and to insure in the Standard Life Association, and for the purpose of bringing about such a result made statements derogatory to the appellant company. Fitzpatrick learned that such statements had been and were being made, and he published the libel complained of. It was a circular letter sent to several persons insured in the appellant company in answer to inquiries made by them. It was plainly defamatory. Some statements contained in it were not true, and Fitzpatrick knew they were not true. There was evidence of express malice on the part of Fitzpatrick. There is no note of the learned Judge's summing-up, but the jury found a verdict for the plaintiff, gave him £650 damages, and found that "Fitzpatrick was acting in publishing the libel within the scope of his employment and in the course of his employment." Judgment was accordingly entered for the plaintiff for this sum and costs; and the Supreme Court refused to set aside the verdict and enter judgment for the defendants, and refused to grant a new trial. Hence the present appeal.

Counsel for the appellants contended, first, that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and, secondly, that even if he did, yet the malice with which he wrote it cannot be imputed to the company. In support of this proposition reliance was placed on the well-known judgment of the late Lord Bramwell in *Abrath* v. *North-Eastern Ry. Co.* (1).

It will be convenient to dispose of the second question first. There is no doubt that Lord Bramwell held strongly to his opinion that a corporation was incapable of malice or motive, and that an action for malicious prosecution could not be maintained against a company. Lord Cranworth in *Addie* v. *Western Bank of Scotland* (2), had expressed a similar opinion as to the liability

(1) 11 App. Cas. 247, at p. 250. (2) (1867) L. R. 1 H. L., Sc. 145.

of corporations for frauds. But these opinions have not prevailed, and their Lordships are not prepared to give effect to them. If it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the Acting Chief Justice in this case that, if Fitzpatrick published the libel complained of in the course of his employment, the company are liable for it on ordinary principles of agency. Fitzpatrick's letter, although published on a privileged occasion, was not itself privileged; and not being privileged the letter must be treated as any other libel written and published by an officer of the company.

There remains, however, the important question whether there was evidence on which the jury could properly find that the publication of the letter was within the scope of Fitzpatrick's authority or, what is the same thing, within the scope of his employment. He was engaged by a written agreement; he was a superintendent; he was to act under instructions given to him by properly authorized officers and in accordance with the rules and regulations of the company. He was to devote his whole time to furthering the company's business. He was to receive and pay money, keep proper accounts, and to supervise various agencies under him. He was to be paid a salary of £5 a week and a commission on policies procured by him. The written agreement did not state more precisely what his duties were. Witnesses were called to throw further light upon the subject. Mr. Eedy, the general secretary of the company, said that if policy-holders wanted to know why the company did not prosecute Brown for his statements about the company, Fitzpatrick should have communicated that matter to the head office before taking action. "It would have been his duty." Another witness said his duty was to appoint and look after agents, and "to stand as an intermediate between the assured and the office. His

authority is to secure business and save business and to visit policy-holders whose policies have lapsed or are likely to lapse. In the district itself there is no one above him." It is clear that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. In considering the scope of his authority and employment their Lordships agree with the Acting Chief Justice in thinking that the jury were entitled to act on their own knowledge of Colonial business and habits. They were entitled to consider the necessities of the case arising from the size and nature of the district placed under Fitzpatrick's supervision, and what would naturally be done in the Colony by a person in his position. He had no actual authority, express or implied, to write libels nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said: "although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant." This doctrine has been approved and acted upon by this Board (in *Mackay* v. *Commercial Bank of New Brunswick* (3); *Swire* v. *Francis* (4)), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (5), which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (6), and has been followed in numerous other cases.

Such being the evidence, their Lordships cannot judicially hold that there was no evidence to warrant the jury in finding that it was within the scope of Fitzpatrick's authority and employment to write to policy-holders in order to counteract the mischief which Brown was doing to the business of the company; and although Fitzpatrick went too far and made charges against Brown which he knew were not true, their Lordships are of opinion that the company are legally responsible for what he wrote.

As regards the verdict being against the weight of evidence, it must be borne in mind that Simpson, J., who tried the last action,

(3) (1874) L. R. 5 P. C. 394
(4) (1877) 3 App. Cas. 106.
(5) L. R. 2 Ex. 259.
(6) (1880) 5 App. Cas., at p. 326.

was satisfied with the verdict, and he reports that the Judges who tried the two previous actions were also satisfied with the verdicts given in them. Their Lordships see no reason for thinking the verdict wrong on the evidence adduced.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal, and the appellant company must pay the costs.

Responsibility of Company for Tortious Act of Agent.

CORNFORD v. THE CARLTON BANK, LIMITED.

1899. 15 T. L. R. 156; 16 T. L. R. 12.

This case raised the question whether an action for malicious prosecution would lie against a corporation.

The facts of the case were shortly as follows:—The plaintiff, Mrs. Ada Sarah Cornford, was at the time of the cause of action owner of a grocer's shop with an off license attached to it at Hastings. It appeared that the defendants, who are a limited company and who lend money, advanced a sum of £5 to one Gower. The plaintiff's husband became surety for Gower. Default was made in repayment of the loan, and judgment was obtained against the plaintiff's husband as surety, and an execution was levied on the plaintiff's goods at her shop in Hastings. It appeared that before the husband became surety he filled up a form of declaration to the effect that he was a householder and that the goods at the shop were his. The plaintiff claimed that the goods were hers and an interpleader issue was tried in the Hastings County Court. Judgment was given by Judge Martineau in favour of the plaintiff. The question of alleged fraud on the part of the plaintiff and her husband was gone into, and the Judge in his judgment said he was of opinion that they did not intend to deceive. Subsequently a charge was brought against Mrs. Cornford by an agent of the defendants for conspiring with her husband and Gower to defraud them. The case was heard before the borough magistrates at Hastings on June 16th last. On that occasion, at the request of the defendants' solicitor, a remand was granted for the purpose of getting further evidence, and on June 23rd Mrs. Cornford was again brought up, when the charge was dismissed. The evidence shewed that the plaintiff's name appeared in small letters over the

door of the grocer's shop as the licensed person, while simply "Cornford" in large letters appeared above the shop. The bills were headed Cornford, and the banking account was in the husband's name. The plaintiff said the husband acted as manager of the business; he received no salary, but had a share in the profits. An objection was taken on the part of the defendants that the contents of the learned County Court Judge's judgment could not be put in evidence. His Lordship, however, admitted the judgment as shewing the amount of information as to the alleged fraud received by the defendant's solicitor prior to the criminal proceedings.

Mr. Justice Darling delivered the following judgment:—This is an action to recover damages against the defendants on the ground of malicious prosecution without reasonable and probable cause. The trial took place before me, without a jury, on the 18th and 19th of this month. As I have not to sum up the evidence to the jury, it is sufficient for me to say that I am satisfied the prosecution instituted against the plaintiff and her husband and Gower was without reasonable and probable cause, and that the defendants were, in directing that prosecution, acting with malice, in the sense that they were actuated by such motives as would be malice in law, were they the motives of a private person. In my notes of the evidence will be found, I think, ample justification for this opinion. It was contended on behalf of the defendants by Mr. Rose Innes, their counsel, that no action for malicious prosecution can lie against a limited company or corporation, because malice cannot be imputed to them. The following authorities were cited:—"*Stevens* v. *Midland Counties Railway Company*" (1), *Edwards* v. *The Midland Railway Company* (2), *Abrath* v. *North-Eastern Railway Company* (3), *Kemp* v. *Courage and Co.* (4), *Nevill* v. *The Fine Arts and General Insurance Company,* (5) *Henderson* v. *Midland Railway Company.* (6) I understand the judgment of the learned Judge in *Edwards* v. *The Midland Railway Company* (2) as being a direct authority that such an action as this one would lie against the present defendants. In that case Mr. Justice Fry (as he then was) delivered his considered judgment after further consideration of a case tried before him at assizes. The judgment of Mr. Justice Fry appears to me in direct conflict with the judgment of Mr. Baron Alderson in *Stevens* v. *The Midland Counties Railway Company* (1), but it is to be observed that

(1) 10 Exch. 352.
(2) 6 Q. B. D. 287 and 50 L. J. Rep. 281.
(3) 11 App. Cas. 247.
(4) 7 *The Times* L. R. 50.
(5) [1895] 2 Q. B. 156.
(6) 25 L. R. Rep. 881.

the other Barons of the Exchequer, Mr. Baron Platt and Mr. Baron Martin, expressly guarded themselves against deciding that such an action as this cannot lie against a corporation aggregate, declaring it to be unnecessary to decide that question in that particular case. The observations of Mr. Baron Alderson therefore appear to me to be *obiter dicta*. This cannot be said of the ruling of Mr. Justice Fry in the case cited. The decision of the House of Lords in *Abrath* v. *The North-Eastern Railway Company* (3), was given in 1886, six years after the judgment of Mr. Justice Fry in *Edwards* v. *The Midland Railway Company* (2). The latter case was not cited in the case of *Abrath* v. *The North-Eastern Railway Company* (3), nor was the decision of the point now in question necessary in that case, as was expressly stated by the Lord Chancellor and Lord Fitzgerald. Yet Lord Bramwell took that occasion to deliver a judgment which, were it binding upon me, would oblige me to determine this case in favour of the defendants. For the opinion of Lord Bramwell on any matter of law it is impossible not to entertain the highest respect; but I confess that in this instance his reasoning appears to me inconclusive. He admits that a corporation may be liable for the malicious publication of a libel, but says a corporation is incapable of actual malice, holding, therefore, that they are capable of implied malice—that is, of malice implied by law. But this is to say that the law will declare a certain thing—malice in a corporation—cannot possibly exist, and then will proceed to imply it. To state the matter thus seems to me sufficient to shew that the distinction attempted between malicious libel and malicious prosecution, as within the competency of corporations or companies, is founded in fallacy. The judgments of Mr. Baron Alderson and of Lord Bramwell proceeded upon the ground that a corporation aggregate has not a "mind," and, therefore, cannot entertain malice. If "malice" in law were synonymous with *malice* in French—a sort of *esprit* tinged with ill nature, I should entirely agree. In such a sense a corporation would be as incapable of malice as of wit. But of malice—actual malice—in a legal sense, I think a corporation is capable. My judgment therefore is for the plaintiff, and I assess the damages at £100. In case there should be an appeal from my decision, I may refer to the case of *The Bank of New South Wales* v. *Owston*, (7) as not without bearing on this question.

On appeal to the Court of Appeal this judgment was affirmed with a reduction of damages.

(7) 4 App. Cas. 270.

The Lord Chief Justice (Lord Russell of Killowen) said that to entitle the plaintiff to recover she must prove two things; first that there was no reasonable and probable cause for the prosecution, and, secondly, that the defendants in instituting the prosecution were actuated by malice. His Lordship then went carefully through the evidence, and stated that he wished to deal with a proposition advanced by the defendants' counsel that the Court had only to consider the state of mind of the directors of the company. A limited company as a legal entity was itself as incapable of malice as it was of love or affection. Malice must be deduced from the acts of servants and officials of the company, and in determining whether there was malice or not regard must be had not only to the acts and conduct of the directors, but also to the acts and conduct of other servants or agents of the company who were acting within the scope of their authority and charged with the institution of the prosecution. His Lordship came to the conclusion upon the whole of the facts that the learned Judge was justified in holding that there was no reasonable and probable cause for the prosecution, and in his (the Lord Chief Justice's) opinion there was evidence of actual malice, and the learned Judge who heard the witnesses came to the conclusion that there was malice, and he (the Lord Chief Justice) saw no reason to interfere. In his opinion, however, the damages were excessive, and justice would be met by assessing them at £50.

The Lords Justices delivered judgment to the same effect.

Responsibility of Company for Tortious Act of Agent in the Course of Business.

BARWICK v. THE ENGLISH JOINT STOCK BANK.

1867, 36 L. J. Ex. 147.

IN THE EXCHEQUER CHAMBER.

Error on a bill of exceptions to the ruling of Martin, B., at the trial, in Middlesex, at the sittings after Trinity Term, 1866.

The first count of the declaration stated that, in consideration that the plaintiff would sell to one Davis a quantity of oats, to enable him to carry out a contract with the Commissariat of the

War Department, the defendants promised that, on receipt of the money from the Commissariat, they would honour Davis's cheque in favour of the plaintiff in priority to any other payment except to their own bank, and alleged performance and breach.

The other counts were for money received and on accounts stated, and for falsely representing that Davis was not indebted to the bank, and thereby inducing the plaintiff to accept the guarantie mentioned in the first count, and supply the oats to Davis.

Pleas—The general issue; and, secondly, to the first count, that the money received by the defendants was not more than enough to cover the defendants' own debt.

Replication taking issue; and, secondly, to the second plea, that the debt due from Davis to the defendants was due before the giving of the guarantie, and that the plaintiff had no notice of it, and the defendants fraudulently concealed it from him, and represented that the payments to be made to the defendants would be for further advances made to Davis.

The evidence given at the trial is stated in the judgment of the Court. The learned Judge ruled that there was no evidence to go to the jury in support of the plaintiff's case, and directed a verdict for the defendants.

Willes, J. (on May 18), delivered the judgment of the Court (1):—This was an exception to the ruling of my brother Martin at the trial, that there was no evidence to go to the jury. It was an action brought by Mr. Barwick against the English Joint-Stock Bank for an alleged fraud, which was described in the pleadings as being the fraud of the bank, but which he alleged to have been committed by the manager of the bank in the course of their business. At the trial two witnesses were called. Mr. Barwick the plaintiff, who proved that he had been in the habit of supplying oats to a customer of the bank of the name of Davis; that he had become dissatisfied with a guarantie which was given him by the bank, through the manager, for the oats supplied to Davis, the terms of which guarantie did not precisely appear. He further stated that he refused to supply more oats without getting a more satisfactory guarantie; that he applied to the manager of the bank, and after some conversation between them a guarantie was given, which guarantie is set out in the bill of exceptions, and is to the effect that if Barwick sold to or purchased for Davis a quantity of oats not exceeding 1,000 quarters for the purposes of the

(1) Willes, J., Blackburn, J., Mellor, J., Montague Smith, J. and Lush, J.

contract which Davis had for supplying the government, then, on the receipt of the money on the Commissariat warrant, for the forage supplied for the then present month, the bank would pay Barwick in priority to any other payment, except to the bank, and provided Davis did not become bankrupt or insolvent. Barwick's statement was, that in the course of the conversation about the guarantie, the manager told him that at whatever time he received the government cheque he, Barwick, should receive his money. Now, that being the state of things upon the evidence of Barwick it is obvious that there was a case for the jury to conclude, if they thought proper, that the guarantie given by the manager was represented by him to be a guarantie which would probably, or might probably, be paid, and they might then probably have come to the conclusion that Barwick took the guarantie supposing it was of some value, and that it would or might probably be paid; but, if the manager, at the time, from his knowledge of the accounts, knew that it was probable in a very high degree that the guarantee would not be paid, and knew and intended that it should not be paid, and kept back from Barwick the facts which made it improbable to the extent of it being a matter of impossibility that the guarantie should be paid, the jury might well have thought that the manager had been guilty of a fraud on Barwick. Now, was there evidence that such knowledge was in the mind of the manager? Barwick had no knowledge of the state of the account; the manager made no communication to him with respect to the state of the account. The evidence of Davis was given for the purpose of supplying that part of the case; and he stated that immediately before the guarantie had been given he went to the manager, told him that it was impossible for him to go on unless he got further supplies, and that the government were buying in against him; on which the manager replied that he, Davis, must go and try his friends; but Davis informed the manager that Barwick would go no further without a further guarantie. Upon that, as the manager admitted, Davis added at the time, "I owe the bank above £12,000." The result was that the guarantie was given, the oats were supplied by the plaintiff to Davis, and were delivered by him, and the Commissariat paid him a large sum of money, about £1,200, which was paid into the bank, and Davis thereupon handed a cheque to Barwick, who presented it to the bank, and without further explanation the cheque was dishonoured. That is the plain state of the facts; and it was contended on the part of the bank that, inasmuch as the guarantie contained a stipulation that Barwick's debt should be paid, subject to the debt of the bank, which was to have priority,

there was no fraud. We are unable to adopt that conclusion. We think that there was evidence from which the jury might conclude that what I have stated did constitute a fraud. To speak sparingly, it was a matter to be tried; and we desire not to anticipate the judgment of the constitutional tribunal. The jury might, on these facts, have justly come to the conclusion that the manager knew and intended that the guarantie should be unavailing; and that he procured the payment of the government cheque to the bank, by keeping back from Barwick the state of Davis's account. If it was a fraud on the manager, then arises the question whether the bank, the employers, are answerable for it? It is enough to say, as to that, that we conceive we are in no respect overruling the opinion of two of the learned Barons, Martin and Bramwell, in the case of *Udell* v. *Atherton* (2), which was most relied on to establish the proposition that a principal is not answerable for the fraud of his agent. Upon looking to that case, it seems very clear that the division of opinion which took place in the Court of Exchequer arose not so much on the question whether the principal is answerable for the act of his agent in the course of his business (for that question was settled as early as Lord Holt's time), as on the application of that principle to the peculiar facts of the case. The person whose act was relied on there, as constituting a liability in the sellers, was the defendant's agents, adopted by them under peculiar circumstances, and not being their general agent in their business, as the manager of the bank is here. But with respect to the question whether a principal is answerable for the acts of his agent done in the course of his master's business, and for the master's benefit, no sensible distinction can be drawn between the case of fraud and that of any other wrong, as to which the general rule is that the master is answerable for such wrong, if committed in the course of his service and for his benefit. That is the principle which is acted on every day in running-down cases, and which has been applied also to direct trespasses to goods, as where owners of ships have been held liable for the acts of the masters abroad in improperly selling cargoes. It has been held applicable to actions of false imprisonment in cases where officers of a railway company, entrusted with the execution of by-laws, have wrongfully, but intending to act in the course of their duty, imprisoned persons supposed to have come within the by-laws. It has been acted on in the case of a person employed by the owners of boats, to navigate boats and take fares for their use, where a ferry has been infringed, or such like wrong committed. In all these cases it may

(2) 7 Hurl. & N. 172; s. c. 30 Law J. Rep. (N.S.) Exch. 337.

be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act; but he has put his agent in his place as to a class of acts, and he must be answerable for the manner in which the agent conducts himself in doing his business. The only other point which was made, and to which our attention has been directed, and which had at first a somewhat plausible aspect, is this: it is said that if the bank is answerable for this fraud of the manager, the fraud ought not to have been described here as the fraud of the bank. I need not go into the question whether it be necessary to resort to the count in fraud, or whether, under the circumstances, the money having been actually procured for and paid into the bank, the count for money had and received is not applicable to the case so as to get over the difficulty, because it should seem that in common law pleading no such difficulty is recognized. If a man is answerable for the wrong of another, whether it be fraud or some other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action. That was the decision in the case of *Raphael* v. *Goodman* (3), where the sheriff sued on a bond; and there was a plea that the bond was obtained by fraud. It was proved to have been obtained by the fraud of the sheriff's officer, and the plea was held to be sufficiently proved. Under these circumstances, without expressing any opinion as to what verdict ought to be arrived at by the jury, we think that this is a matter which was for the determination of the jury, and that there ought therefore to be a trial *de novo*.

Judgment for a venire de novo.

Position of Company Relative to Tortious Act of Agent, which the Company could not Lawfully have Itself Authorized.

POULTON v. THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

1867, 36 L. J. Q. B. 294.

THE COURT OF QUEEN'S BENCH.

Declaration for assaulting the plaintiff, giving him into the custody of a policeman, and causing him to be imprisoned.

(3) 8 Ad. & E. 565; s. c. 7 Law J. Rep. (N.S.) Q. B. 220.

Plea—Not guilty: and issue thereon.

At the trial, before Kelly, C.B., at the Hants Spring Assizes at Winchester, it appeared that in June 1866, the defendants, the railway company, had advertised that arrangements had been made that horses, dogs, &c., going to the show of an agricultural society at Salisbury should be returned by luggage-trains from Salisbury free of charge if unsold, the words being "on return free if remaining unsold, on production of certificate to that effect."

The plaintiff, a groom or horse-agent, took a horse with him to Salisbury, and returned with it by one of the company's passenger trains to Romney, the horse having been put into a box without any payment or booking, and the plaintiff, who had taken a third-class ticket, travelling by the same train. Upon his arrival at the station, he gave up his ticket and the certificate as to the horse; but had not proceeded far with the animal when he was stopped by a guard, acting under the orders of the station-master, who called upon him to pay 6s. 10d. for the carriage of the horse. The plaintiff refused to pay the money, and was thereupon detained for half an hour at the station by two policemen, acting under the orders of the station-master, till instructions had arrived from Salisbury by telegraph.

The jury found a verdict for the plaintiff, damages £10; and leave was reserved to the defendants to move to enter the verdict for them, on the ground that the station-master had no authority to take the plaintiff into custody,

Blackburn, J.:—In this case, it is beyond any dispute that the station-master gave the plaintiff into custody, and it is equally beyond dispute that this was an assault and false imprisonment for which the company would be responsible if the station-master acted by their authority. And the question arises, was there evidence on which the jury might reasonably find that the station-master was authorized to do an act of the same description as that which led to this action, so that, in arresting the plaintiff, he was acting within the scope of his authority? The principle of the case of *Goff* v. *The Great Northern Railway Company* (1) was, that where corporations or private individuals have on their premises a person who alone appears to act as their agent, upon occasions where it is necessary to act with promptness and decision, there is evidence for the jury that he is invested with a general authority to do all that is right and proper on behalf of

(1) 3 E. & E. 672; s. c. 30 Law J. Rep. (N.S.) Q. B. 148.

those of whom he is the apparent representative; and if he is guilty of any impropriety, or goes beyond the limit which the necessities of the occasion justify, his employers are responsible. In the present case, the plaintiff was taken into custody upon an unfounded charge of having caused a horse to be carried upon the defendants' line without paying the fare for it. If the charge had been that the plaintiff had travelled without paying his own fare, it would have been one which, if true, would have justified the station-master in giving the plaintiff into custody, and his act might have made the company liable, for he would not then have departed from the statutory authority conferred by the Railways Clauses Act, 8 Vict. chapter 20, sections 103, 104. But in this case, the station-master gave the plaintiff into custody upon a charge of not paying for the carriage of his horse. As for the argument by the plaintiff's counsel that the word "fare," in the sections which I have just mentioned, may include money payable by a passenger for the carriage of his horse, it cannot be supported for a moment. There are special provisions in the Act, according to which a passenger may be taken into custody for not paying his fare, while, with regard to goods, the company have (by section 97) a general lien to secure what is due in respect of them. Where a passenger has paid the fare due for carrying him upon the line, and the company have only a claim against him for the carriage of goods, it cannot properly be said that he has not paid "his fare" within the meaning of the Act. The question arises, was there evidence from which the jury might reasonably find that the company authorized the station-master to do the act of which the plaintiff complains? We think not. This was not an offence in respect of which there was any power to give the plaintiff into custody, and no inference can be drawn that the company authorized their station-master to do an act which they themselves had no authority to do. The arrest of the plaintiff was, under the circumstances, an act altogether out of the scope of the statutory authority, just as much as any act of lawless violence would have been. In *Goff* v. *The Great Northern Railway Company* (1), there was no difficulty respecting the authority of the company, for the plaintiff was given into custody upon a charge which would have justified his imprisonment if he had been guilty, and the mistake was one within the line of the servant's authority. In *Seymour* v. *Greenwood* (2), Mr. Justice Williams explained, with great clearness, how it was part of the duty of a conductor to remove a disorderly passenger, so that his

(2) 7 Hurl. & N. 328; s. c. 30 Law J. Rep. (N.S.) Exch. 328.

employers would be responsible for any unnecessary violence of which he had been guilty. In *Limpus* v. *The London General Omnibus Company* (3), the question, as I mentioned during the argument, was entirely as to whether the direction of my brother Martin was correct, and whether what the coachman did might have been done in the performance of his duties as coachman. In the present case, an action may be maintained against the station-master; but there can be no presumption that the company authorized the wrongful act, since they had no power to imprison the plaintiff, even supposing that he had improperly neglected to pay what was due for carrying his horse. The rule must, therefore, be made absolute.

MELLOR, and SHEE, JJ., concurred.

Position of Company Relative to Tortious Act of Person Employed by it as Officer of the Law under Public Statute.

THOMAS v. CANADIAN PACIFIC R.W. COMPANY.

BUSH v. THE SAME.

1906. 14 O. L. R. 55.

THE DIVISIONAL COURT, ONTARIO.

Actions for false arrest and malicious prosecution.

MULOCK, C.J.:—These are actions brought against the Canadian Pacific Railway Company for false arrest and malicious prosecution of the plaintiffs, and were tried before His Honour Judge Morgan, junior Judge of the county of York, on March 9th, 1906. At the close of the plaintiff's case, the learned Judge dismissed each action, and from these judgments, the plaintiffs now appeal.

The facts material to these appeals as disclosed at the trial are as follows:—

One James Jardine was a watchman of the defendant company, and, under the provisions of section 241 of the Railway Act, 1903, had apparently been appointed constable to act upon and

(3) 1 Hurl. & C. 526; s. c. 32 Law J. Rep. (N.S.) Exch. 34.

along the line of the Canadian Pacific Railway. This section provides that such an appointment may be made on the application and recommendation of the railway company desiring it, and requires the person so appointed to take an oath or declaration in the form or to the effect therein set forth. In the present instance, Jardine, on April 29th, 1904, made oath to his appointment, and on September 2nd, 1904, caused this affidavit to be filed in the office of the clerk of the peace for the county of York. It does not appear when he ceased to be such constable, and it may be assumed that he was still constable at the time of the arrest and prosecution in question.

There is evidence from which the jury might have concluded that Jardine was in the defendants' employ as watchman on Sunday, December 11th, 1904. On the evening of that day, he met the plaintiffs near the corner of King and Jordan Streets in Toronto, when he seized them both, saying "I want you," and marched them off to the police station. On arrival there, he handed them over to the sergeant in charge, saying, "here's two more." The plaintiffs were detained in custody until the following Wednesday. On December 13th, Jardine swore to an information charging the plaintiffs with having broken into a freight car of the defendants with the intent of stealing therefrom, in this information describing himself as "James Jardine, C.P.R. Constable of the City of Toronto." The plaintiffs were remanded until December 16th, when their cases were proceeded with. On this inquiry, Jardine swore that he was a C.P.R. constable, and that a freight car of the C.P.R. in Toronto had been broken into, but his evidence in no way connected the plaintiffs with the matter, and they were thereupon discharged, and this action is brought because of Jardine's part in the arrest and prosecution in question.

In order to establish liability against the defendants, it is not sufficient to shew merely that Jardine was in their employment, but the plaintiffs must shew that he acted with their authority, express or implied. In *Roe* v. *Birkenhead & Lancashire & Cheshire Junction R.W. Co.* (1), Pollock, B., says at p. 40: "The rule is the same between a private individual and a railway company, as it is where the same matter is in dispute between two private individuals. The general rule is, that a master is not liable for the tortious act of his servant, unless that act be done either by an authority, express or implied, given him for that purpose by the

(1) (1851) 7 Exch. 36.

master. If it had appeared in the present case that the act complained of was one which the company had legal authority to perform, the act would not have been tortious, and it might well have been put to the jury as having been done by an authority given by the company. But there was no evidence whatever that the act was of that character, and, therefore, as the case stands, we must take it to be a tortious act. It, therefore, follows that the plaintiff was bound to shew that the person by whom he was arrested was not only the servant of the company, but also that he had their authority to arrest him. Now I think that, although there may have been some evidence that Phillips was in the service of the company, there was no evidence that he had any previous authority from the company to take the plaintiff into custody."

It was not attempted to be shewn that Jardine had any express authority, and the onus is upon the plaintiffs to give evidence justifying the jury in finding that, from the nature of his duties, he had implied authority from the defendants to make the arrest: *Goff* v. *Great Northern R.W. Co.* (2).

Jardine was at the same time watchman for the defendants and constable appointed under the statute with such duties and powers as the Act conferred upon him.

This dual position involves a consideration of his implied authority in each capacity. As watchman, deriving authority from the company, it was his duty to protect the property on their premises which they had entrusted to his care, and he was thus clothed with implied authority from them to do such reasonable acts as he might, on the exigency of the moment, deem necessary, in order to prevent injury to their property.

If, therefore, he had found the plaintiffs on the premises of the defendants, endeavouring to steal the property placed by them under his charge, it would have been within the scope of his authority, as their servant, to arrest them, if he deemed it advisable to do so, in order to perform his duty as watchman, of preventing injury to the property in question. But such was the limit of his implied authority, and any acts of his in excess of such authority would not bind the defendants: *Poulton* v. *London & South-Western R.W. Co.* (3), *Lyden* v. *McGee* (4).

In *Abraham* v. *Deakin* (5), the Court (at p. 521) adopted, as a correct exposition of the law, the view expressed in *Bank of New South Wales* v. *Owston* (6), "that the mere fact that a

(2) 3 E. & E. 672, 674.
(3) L. R. 2 Q. B. 534, 540.
(4) 16 O. R. 105, 108.
(5) [1891] 1 Q. B. 516.
(6) (1879) 4 App. Cas. 270.

man was the manager of a bank did not confer upon him an implied authority to give a man into custody for stealing a bill of exchange when the act was past and gone, and the arrest of the offender was not necessary for the protection of the property of the bank, but was made only for the purpose of punishing him and vindicating the law." (*Here follow quotations from Poulton* v. *London and S. W. Ry. Co., supra.*)

Here, the arrest was made after the attempted robbery, and on a public street some distance from the defendants' premises, and on the following day, Jardine swore to an information charging the plaintiffs with having endeavoured to break into a freight car with intent to steal therefrom. There was no evidence that anything, in fact, had been stolen. The defendants' property was safe before the arrest. Therefore, that act and the subsequent events complained of were not in the interest of the company, either for the purpose of preventing a theft or of recovering stolen property, but were simply punitive in their character, in vindication of the law, an object in which the company in common with the general public was interested.

Under the Railway Act, the company had no authority to do what Jardine had thus done, and it ought not to be inferred that the company had conferred on him authority to do what it could not itself lawfully do: *Allen* v. *London & South-Western R.W. Co.* (7); unreported case of *Jones* v. *Duck*, The Times, March 16th, 1900.

I, therefore, think that, as watchman, Jardine had no implied authority from the defendants, either to arrest or prosecute the plaintiffs, and that the defendants are not liable therefor.

The next question is whether, assuming that the arrest and prosecution were made by Jardine in his capacity of constable, the defendants are liable therefor. At their instance, he was, under the provisions of section 241 of the Railway Act, 3 Edw. VII. chapter 58, appointed to act as constable on and along their railway.

Sub-section 2 empowers a person so appointed to "act as a constable for the preservation of the peace, and for the security of persons and property against unlawful acts on such railway, and on any of the works belonging thereto * * * and in all places not more than a quarter of a mile distant from such railway, and shall have all such powers, protections and privileges for the apprehending of offenders, as well by night as by day, and for

(7) (1870) L. R. 6 Q. B. 65.

doing all things for the prevention, discovery and prosecution of offences, and for keeping the peace, which any constable duly appointed has within his constablewick."

Sub-section 6 enacts that "every such constable who is guilty of any neglect or breach of duty in his office of constable, shall be liable, on summary conviction * * * to a penalty not exceeding eighty dollars, or to imprisonment. * * * Such penalty may be deducted from any salary due to such offender, if such constable is in receipt of a salary from the company."

There was no evidence that the defendants gave any instructions or directions to Jardine in the discharge of his duties as constable at any time. On the contrary, they appear to have wholly abstained from interfering with him, leaving him to perform, in accordance with his own judgment, the duties cast upon him by the statute.

Thus Jardine having no express authority from the defendants to make the arrest and lay the information, they would not be liable unless an implication of authority would arise because of their having brought about his appointment as constable.

In *Hart* v. *City of Bridgeport* (8), *Eastman* v. *Meredith* (9), *Maxmilian* v. *Mayor, etc., of New York* (10), *Baker* v. *West Chicago Commissioners* (11), and numerous other cases that have come before the Courts of the United States, the view has been expressed that the preservation of the peace, protection of property, prevention and punishment of crime, are public duties in the discharge of which the whole community is interested and which the State is bound to perform for the benefit of society generally, and that if, for convenience, the State delegates to municipalities the power of appointing peace officers, these latter in the exercise or non-exercise of their police powers, are not servants or officers of the municipalities, which may have appointed them, but which have no control over them in the discharge of their duties.

For the like reason, such peace officers appointed on the recommendation under the authority of competent legislation by a railway company, must be regarded as officers of the law and not as servants of the company.

Under the Act in question, whilst the railway may apply to the authorities to appoint constables, and may in that connection

(8) (1876) 13 Blachford Circuit Court Rep. 289, 294.
(9) (1858) 36 N. H. 284.
(10) (1875) 62 N. Y. 160.
(11) 1896, 66 Ill. App. 507.

make recommendations of persons for appointment, it has no power to appoint, the Act vesting that power in justices of the peace, members of the judiciary, and other public functionaries.

The statute declares what shall be the duties, powers and privileges of these constables, and imposes upon them the obligation of performing their duty, under heavy penalty in case of neglect, and provides for their dismissal by any County Court, superior Court Judge, etc; the only interference allowed by the statute to the company being to dismiss "any such constable who is acting on such railway."

Thus, a constable, on his appointment, derives his authority from the statute not from the company, and is bound by the statute, even against the wishes of the company, to perform the duties cast upon him by the statute.

Unless, therefore, the company should actively interfere by directing his movements, he is no more an agent of the company than would he be if at the request of a private citizen, he were detailed by his superior officer to guard a man's private property.

There is no evidence to shew that in either of these cases the defendants exercised any control over Jardine's action as constable, and, therefore, as held in *O'Donnell* v. *Canada Foundry Co.* (12), they are not liable therefor.

In *Dennison* v. *Canadian Pacific R.W. Co.* (13), Macleod, J., expressed the view that a railway company, simply because of procuring the appointment of a constable under the Act, did not thereby become responsible for his action as constable.

I think the appeal should be dismissed with costs.

MABEE, J., and BRITTON, J., concurred.

With regard to this judgment there should be observed the apparently different rule of the English Court of Appeal as set forth in *Lambert* v. *Great Eastern Railway* (14), a similar case. There Cozens-Hardy, M.R., in giving judgment with the concurrence of Farwell, L.J., and Kennedy, L.J., said:—

"What is the position of these constables? The county authorities who have to do with the ordinary police force are expressly exempted and excluded from all jurisdiction in the matter. They cannot either appoint or remove. They do not pay. It is the railway company who employ: it is the railway company who pay: it is the railway company who dismiss, and in these circumstances it seems to me these are men bound to

(12) 5 O. W. R. 216. (13) 36 N. B. 250, 253.
(14) 79 Law J. K. B. 32.

obey the orders of the railway company, and bound to obey no other orders of any sort or kind, and that in the acts which they did they acted as servants of the company. No doubt they are servants who are given a special immunity and protection and they have the peculiar protection which other constables have—namely, that they are not liable if they have reasonable ground for believing that a felony has been committed, and that the person whom they have arrested was guilty of a felony. If they had such reasonable grounds, their employers, I take it, would not be liable for their acts, but if they had not reasonable grounds, then it seems to me that their employers must be liable."

Position of Company Relative to Tortious Acts of Agent intra vires of Company, but without its Authority.

BEARD v. LONDON GENERAL OMNIBUS CO.

1900, 69 L. J. Q. B. 895.

THE COURT OF APPEAL.

Appeal by the plaintiff from a judgment of Lawrance, J., in favour of the defendants.

The action was brought to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendants or their servants in their employment.

The plaintiff alleged and proved that on December 31st, 1899, at two o'clock in the afternoon, he was riding a bicycle on Battersea Rise Hill, when he was knocked down by an omnibus of the defendants and injured. The omnibus was on its way from the stables to a public-house known as the Norfolk Arms, where its journey commenced. The man on the box who was driving the omnibus was a duly licensed conductor, but not a duly licensed driver, and, though to all appearances a driver, he was in fact the conductor and not the driver of this omnibus. When the accident happened, the omnibus was being driven downhill at a rate of seven or eight miles an hour.

Upon these facts, the learned Judge directed the jury to find a verdict for the defendants, which they did, and judgment was entered accordingly.

The plaintiff appealed.

A. L. SMITH, L.J.:—This is an appeal from a judgment of Mr. Justice Lawrance in favour of the defendants. The plaintiff, who was riding a bicycle, was run over by an omnibus belonging

to the London General Omnibus Co., the defendants. He brought this action against them for the negligence of their servant in the course of his employment. Now I agree with counsel for the appellant that if the plaintiff had simply given evidence that the omnibus was being driven negligently, there being no reason to suggest that it was being driven by any one but the driver, the presumption would have been that it was driven by the defendants' authorized agent or servant in the course of his employment. But that is not this case. The Judge here ruled that there was no evidence to go to the jury, and we must look at the case as it appeared before the Judge. In this case, counsel for the plaintiff, in his opening speech, said that the omnibus was not being driven by the driver, but by the conductor. Does not the plaintiff thereby negative the presumption that the omnibus was being driven by the authorized agent or servant in the course of his employment? *Prima facie,* it is no more the duty of a conductor to drive than it is the duty of a driver to collect tickets. Suppose the case had been opened thus—that the omnibus was being driven by a stranger: would that have disclosed a *prima facie* case against the defendants? I think not. And similarly when the case was opened that the omnibus was being driven by the conductor, the *prima facie* presumption that it was being driven by an authorized agent or servant in the course of his employment was negatived. The plaintiff had then to go further and prove some emergency or necessity or some authority from the masters justifying the conductor in driving for and on behalf of his masters. But no such evidence was given, and, therefore, Mr. Justice Lawrance was right in holding that the plaintiff, proving that the omnibus was being driven by the conductor, had failed to prove a *prima facie* case. The judgment was rightly entered for the defendants, and this appeal must be dismissed.

Vaughan Williams, L.J.:—I think this case is on the border-line. I agree that if on the evidence it were clear that the conductor was doing some act outside his functions, the judgment for the defendants would be right, but I do not think we have any right to assume that the functions of a driver and a conductor are so mutually exclusive that it is necessarily beyond the functions of a conductor to take charge of the omnibus during the absence of the driver. I think the omnibus proprietor sends out his omnibus in charge of a driver and a conductor, and that, although driver and conductor have different functions to perform, it is consistent with that fact that it may be within the scope of the authority of either of them to perform temporarily

the functions of the other during his absence. If on the plaintiff's case there was evidence that one journey had come to an end, and that another was about to commence, and that at a time between the end of one and the commencement of the other, the conductor was turning the omnibus round, and the accident then happened, I should have thought that was a case to go to the jury, and that it was for the defendants then to shew that it was outside the functions of a conductor to take charge of the omnibus during the absence of the driver. But the evidence here speaks of the omnibus coming downhill at a speed of eight miles an hour, and, therefore, it does seem that the conductor in charge of the omnibus was not performing a mere temporary duty during the absence of the driver. It is consistent with the facts that the driver may have done what he had no right to do—that is, to delegate generally his duty to the conductor.

It would be unfortunate if it should go forth that whenever a conductor is found exercising some function of the driver, a plaintiff must fail in an action against the master unless he can adduce evidence to account for the temporary absence of the driver, and that unless he can do this, there is no case to go to the jury. The sounder and safer course, where an omnibus is sent out with a driver and conductor, is to leave it to the jury to say whether the particular act done by the conductor is in the scope of his authority as conductor or not. It is very well to say that one knows that the function of a driver is to drive, and that of a conductor is to conduct. But one cannot deal with the case on one's own hypothesis as to what the scope of that authority may be. I cannot say of myself what the duty of a conductor may be at the end of a journey with reference to the horses; an omnibus conductor may have duties similar to a tramway conductor. I do not think it is sufficient reason for withdrawing the case from the jury that the act done is driving and the actor is a conductor and not a driver.

But, as far as this particular case is concerned, this consideration is of little importance, because the evidence of the plaintiff himself is that the omnibus was being driven at a great pace downhill. When that was proved, the burden of proving the conductor's authority lay upon the plaintiff, such an act being *prima facie* an act which was not in the authority of any one but the driver, and the mere absence of the driver was not any ground for letting the case go to the jury. My own view is that, during the actual personal absence of the driver when the omnibus is out on its journey, it is *prima facie* the duty of the conductor to take

charge of the omnibus; and as long as it appears that that which he is doing is taking charge and nothing more, the onus lies on the defendants to prove that he was doing something more than merely taking charge. I wish to point out that in the case of *Gwilliam* v. *Twist* (1), there was no finding as to what was done by the conductor. The driver was not absent. I only speak of a case where the driver is absent, and of the *prima facie* duty of the conductor in such a case. The question then is: Did he do anything beyond his duty to take charge of the omnibus? Here, driving at a pace of seven or eight miles was an act beyond the scope of that duty, and, therefore, the plaintiff had to prove some authority more than that involved in the *prima facie* duty of the conductor to take charge of the omnibus.

ROMER, L.J.:—I agree. An omnibus driven in the streets of London in the ordinary way is presumably driven by some one authorized by the proprietor to drive; but that proposition may be rebutted. Here it is rebutted by the plaintiff's own evidence that in fact the person driving was not the person ordinarily authorized to drive, but was the conductor, who was, in my opinion, a person not authorized to drive. Therefore, the onus lay on the plaintiff to prove authority. No authority, of necessity or otherwise, was even alleged. It is said that the Court ought to infer a case of necessity, and that it was for the defendants to prove the contrary. I do not see how any case of necessity could have arisen. I think, therefore, that the appeal fails.

Appeal dismissed.

Tort Committed Under Ultra Vires Direction of Corporators. Liability of Corporators and Agent.

(In these cases the agent will, and the corporators acting probably will be liable, but the corporation evidently not. Text writers discuss the subject with considerable indefiniteness. The centre of discussion usually is the case now to be quoted. The case and the important dissenting judgment of Kelly, C.B., are given at length, so that there may be a full understanding of the questions involved. There seems to be no later decision of note precisely in point, and the law would

(1) 64 L. J. Q. B. 474; [1895] 2 Q. B. 84.

now probably be taken to be that in cases of tort disassociated from contract, the corporation is not liable, but that the corporators actually engaged in the tortious act, or their agents, acting in the matter, are.)

MILL v. HAWKER AND OTHERS.

1874. 43 L. J. Ex. 129. 44 L. J. Ex. 49.

THE COURT OF EXCHEQUER AND THE EXCHEQUER CHAMBER.

Action for trespass to the plaintiff's close, and for breaking open gates therein, and carrying away locks.

Plea, not guilty, by statute (5 & 6 Will. IV. chapter 50, and 25 & 26 Vict. chapter 61). Issue thereon. At the trial before Kelly, C.B., at Bodmin, at the summer assizes, 1873, it was proved, on the plaintiff's part, that he had caused a gate which crossed a footway on his property at Crapp's Park to be locked. It was alleged that this was a public footway, and the subject was brought forward at a meeting of the board of waywardens or highway board of the Camelford highway district, held on or about the 29th of November, 1872, at which all of the fourteen defendants were present. The defendant, Claudius C. Hawker, was clerk of the board, and all the other thirteen defendants, except Wickett, were members of the board. The defendant Wickett was the district surveyor of the board. It was sworn, in answer to the usual interrogatories administered by the plaintiff to the defendants, that all the defendants (except Hawker and Wickett) being present at the board meeting, directed or concurred in directing the defendant Wickett to remove the locks from the plaintiff's gate, and that the defendant Wickett did so on the day following the meeting by direction of the board given at the meeting. Before removing the locks, Wickett received from the clerk of the board the following order:—

"Camelford Highway District,
"30th Nov., 1872.

"Dear Sir,—The highway board at their meeting yesterday ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to

the highway leading from Boscastle to Minster Church and Lesnewth, and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the said road.

"By order of the board,

"Claude C. Hawker, Clerk.

"Mr. Wickett."

It was admitted by the plaintiff that he could not maintain the action against C. C. Hawker.

The evidence prepared on either side for the determination of the question whether this was a public footway or not was not given, because it was objected on the defendants' behalf that the action should have been brought against the highway board, and that none of the defendants were individually liable; and Kelly, C.B., admitted the objection and nonsuited the plaintiff.

A rule *nisi* to set aside the nonsuit and for a new trial having been obtained on the ground that the learned Judge misdirected the jury in ruling that the defendants were not individually liable, and that the surveyor was not liable—

Cleasby, B.:—There are two questions raised in this case. A trespass was committed upon the plaintiff by taking the lock off one of his gates, and the two questions are—

First, whether the defendant, Matthew Wickett, is liable for the trespass.

Secondly, whether the other defendants (except Claudius C. Hawker) are liable.

[After stating the facts above set out, the judgment proceeded—]

For the purpose of the present enquiry, the trespass having been proved, and no justification proved, it must be taken that the removal of the locks was unlawful; if the objection had not prevailed, as matters stood, the plaintiff would have been entitled to a verdict.

With regard to the first question, viz., the liability of Wickett, it appears to us that the general rule applies, and that a servant who does an act which is unlawful cannot justify it because it was done by the order of his master or employer. This rule

applies as much to the servants of those who act in a public as in a private capacity. The mere fact of persons having a public office or employment (whether created by Act of Parliament or not) does not take them out of the operation of the law, and give to their acts any greater force or efficacy, or to their servants any impunity.

There is an apparent exception to this in the case of sheriffs or officers of Courts of justice, who are excused if the judgments and process under which they acted are subsequently reversed; and the officers are still excused if they acted in the execution of the process. The defendants relied on this exception, and cases were referred to. See judgments in *Andrews* v. *Marris* (1), and *Dews* v. *Ryley* (2). But there is no analogy between the case of the officer of a Court of justice—whose duty it is to give effect to the judgment of the Court, which, though erroneous, cannot be called illegal, if the Court have jurisdiction on the subject-matter—and a servant obeying the order of his superiors, whose orders may be legal or not, as the case may be. It is, no doubt, a hardship that an act of obedience to the order of a public body should involve a responsibility, but the risk is small of public bodies (which act generally under advice) doing illegal acts, and the hardship is no ground for setting aside so fundamental a rule as that the person who himself does an illegal act becomes by doing so responsible, and may be sued by the person injured without his looking any further.

There is nothing in the Act of Parliament under which the surveyor is appointed to exempt him from liability. The effect of the sections relating to the appointment of surveyor is (sections 12 and 16) to establish the relation of principal and agent, or master and servant, between them. The words of the 16th section, that "he shall in all respects conform to the orders of the board in the execution of his duties," cannot be read to mean that he shall be bound to obey the orders of the board whatever they are. Previous to this Act of Parliament the surveyor had been authorised to act upon his own judgment; but this enactment makes it his duty to abide by the directions of the board as his superiors in all matters relating to the repair of the road. It is hardly reasonable to read it as importing that he is relieved from responsibility for whatever he does, provided he acts by their orders. The object is to regulate his conduct, and not to limit his responsibility to third persons.

(1) 1 Q. B. Rep. 3; s. c. 10 Law J. Rep. (N.S.) Q. B. 225.
(2) 11 Com. B. Rep. 434; s. c. 20 Law J. Rep. (N.S.) C. P. 264.

As regards the other defendants who came to the resolution, in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued.—*The Attorney-General* v. *the Mayor, &c., of Liverpool* (3); *The Attorney-General* v. *Retford* (4). There is, indeed, an express provision to this effect as regards the members of the highway board, but it is expressly limited to lawful acts of the board in section 9, sub-section 6 of the Highway Act, 25 & 26 Vict. chapter 61; and it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do it, are acting *ultra vires*, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for the conclusion. But the case of *Taylor* v. *The Dulwich Hospital* (5) and *The King* v. *Watson* (6) may be referred to in support of it. And in this case, unless the letter of the 30th of November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant, Wickett, swears in answer to the interrogatories, that he removed the locks by the direction of the board, given at the meeting, that is, of the 29th of November. In the case of *Poulton* v. *The London and South Western Railway Company* (7), and particularly the judgment of Blackburn, J., the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts. Now the highway board have authority to do what the surveyor would do under the previous Act. They have all the powers, rights, duties, liabilities, capacities

(3) 1 Myl. & Cr. 171.
(4) 3 Myl. & Cr. 484.
(5) 1 P. Wms. 655.
(6) 2 Term Rep. 199.
(7) 8 B. & S. 616; s. c. 36 Law J. Rep. (N.S.) Q. B. 294.

and incapacities of the surveyor (section 11), and are to be deemed successors to the surveyor (section 43, sub-section 3). It might be sufficient to say that in the case of a disputed footway the order to remove an obstruction could only follow upon something like a judicial act of the surveyor in determining whether there was or was not a public footpath, and he has no authority whatever to act judicially in such a matter.

But a reference to the sections of the previous Act would shew that the surveyor had no such power of removal. Section 72 of 5 & 6 Will. 4, chapter 50, does not apply at all, and section 73 only enables the surveyor to remove any obstruction after he has obtained the order of a justice. In like manner the power of a surveyor to remove encroachments is founded upon a conviction under section 69—*Keane* v. *Reynolds* (8).

In reality the right of a person to take the law into his hands, and use force to remove an obstruction, is founded upon this, that he is at the time using the highway (as he is entitled to do), and as he cannot use it without removing the obstruction, he is justified in doing so, and the precedents in pleading put it on that ground. There is no right to remove the obstruction as a retaliation upon the person who has put it there. But a corporate body who orders the removal, and so uses force in determining a legal right, is in a different position. They do not want to use the road, and have not the justification of necessity in the exercise of a legal right; they can only justify it on the ground that they have come to the determination that the obstruction is illegal and ought to be removed, and they are not authorized to enter upon such an enquiry, or form such a conclusion. It is the province of the justice to whom an application may be made to form such a conclusion.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal, and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them perhaps the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds entrusted to them

(8) 2 E. & B. 748.

for public purposes, by proceedings which might originate in feelings which it would be most inconvenient to enquire into. Sections from 17 to 19 shew what the office of the highway board is, and that it is a corporation for a particular purpose to do what is necessary to keep the highways in repair. And the provision in section 18, as to certain costs resulting from applications to justices being regarded as costs of the board in repairing the highway and paid accordingly, shews conclusively, to our minds, that the damages and costs of defending an action of trespass such as the present, could not be costs of the board or in any way chargeable upon the parishes forming the board, or either of them. It would appear to be only right if such damages and costs were payable at all, that they should be paid by the parish in which the road is situate, like the expense of repairing the road. And yet the persons who ordered the trespass might be the persons representing the other parishes in the district and not the parish where the road is situate; and what a strange state of things this would introduce. Section 20 provides that there shall be a district fund, and that the salaries of the officers of each parish, and all expenses incurred by the highway board for the common use and benefit of all the parishes in the district, shall be paid out of the district fund. This could not include the damages and costs, and they could not come out of the district fund. The section goes on to provide that the expense of keeping in repair the highways of each parish, and all other expenses in relation to such highways, shall be a separate charge on each parish. It would certainly seem strange if the highway board had the power by a resolution of throwing upon a particular parish such a charge as that of paying the damages and costs of an action like the present; and unless they could do so, there would be no fund out of which the damages and costs could be paid. When the parish denies the obligation to repair, section 19 points out the course to be pursued.

It appears to us that it is not the province of the highway board to contest the question, whether a particular way is a public highway or not, as the members of the board chose to do by the resolution set forth at the beginning of this case.

For the above reasons, we think that, as the plaintiff was nonsuited, there ought to be a new trial in this case.

KELLY, C.B.:—The highway board of the district of Camelford, in Cornwell, constituted and incorporated under section 9

and other sections of the 25 & 26 Vict. chapter 61, upon the complaint of the churchwarden of the parish of Minster, that a highway in that parish and within the district had been obstructed by a locked gate thrown across it (as was alleged contrary to the statute), at a corporate meeting duly convened and held according to the Act, having investigated the matter of the complaint, came to the following resolution which was then and there entered in the minutes—"Resolved that the board having heard the complainant, and the defendant, Mr. Mill" (the plaintiff in this action), "and their witnesses as well as Mr. White (the defendant's attorney), is of opinion that the road leading from Boscastle by the Wellington Hotel through Crapps' Park is a public road, and that therefore Mr. Mill, the tenant, and Miss Helyer, the owner of the land through which it passes, be served with notices to remove the obstruction they have created, and if the same be not removed on or before six o'clock of the 31st inst., the district surveyor remove the same (9)."

These notices having been given and disregarded, and the resolution being notified to Wickett, the district surveyor, an order of the board, signed by their clerk, forthwith to remove the obstruction, was duly served upon him, and he proceeded in obedience to the order to remove the lock from the gate, which was the trespass complained of in this action.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character, but against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not.

The making of the resolution was a corporate act, done at a corporate meeting, convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise, or did exercise any personal authority or power. The resolution was the act of the corporation, and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof.

I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name

(9) This meeting appears to have been held on the 30th August, 1872.

be used as a mere colour for the malicious act; or unless the act is *ultra vires*, and is not and cannot be, in contemplation of law, a corporate act at all.

In *Herman* v. *Tappenden* (10), the free fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected—"That no action would lie to recover damages against individuals for acts done in their corporate capacity; and that *non constat,* but that all or some of the defendants might have voted against the order of amotion."

When the case came before the Court upon a motion to enter a nonsuit or in arrest of judgment, the Court intimated very strong doubts on this ground, how far the defendants were answerable in damages in their private character for acts done by them in their corporate capacity, and Lord Kenyon, C.J., said that he entertained considerable doubt notwithstanding what was said in *Rich* v. *Pilkington* (11), and *The King* v. *Ripon* (12), and added that he had many years ago moved for a mandamus to the Master and Fellows of Wadham College to compel them to put the college seal to a return which they were required to make and to which Dr. Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences; but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character. Lawrance, J., expressed the same doubt, and finally on cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged. See also Ventris, 351, and *The King* v. *Windham* (13), the case alluded to by Lord Kenyon.

It is true that where individuals make a pretended corporate Act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *The King* v. *Watson* (6). But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion

(10) 1 East 555.
(11) Carth. 171.
(12) 1 Ld. Raym. 563.
(13) Cowp. 377.

that the action must be brought against the corporation in its corporate character and not against an individual member who like Dr. Windham in the Wadham College case may have been opposed to the Act in respect of which the action may be brought. It was indeed once imagined, though on very technical grounds, that trespass would not lie against a corporation; and it is so stated in Comyn's Digest, Franchises F (13). But, besides that many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation or under its authority or by its direction trover or trespass is maintainable.

In *Yarborough* v. *The Bank of England* (14), the plaintiff recovered in trover for the unlawful detention by a clerk in the bank under its authority, of a Bank of England note. Can it be contended that an action could have been maintained against one of the directors of the Bank of England who might have been present at the resolution that the clerk be directed to detain the note? In *Smith* v. *The Birmingham and Staffordshire Gas Light Company* (15), trover was held maintainable against the company (a corporation) for the wrongful seizure of a quantity of furniture by a bailiff under their authority. And in *Maund* v. *The Monmouthshire and Staffordshire Canal Company* (16), the plaintiff recovered in trespass for the seizing and converting under the orders of the defendants of certain barges and a quantity of coal. It was never suggested that in either of these cases the action should have been brought against the individuals who happened to be present when the act in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board; and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law are great and obvious. If judgment be recovered against these defendants, execution might issue for the whole amount of damages and costs against any one among them; and he would have no remedy for contribution against the rest, nor, as it should seem upon the facts of the case, for indemnity against the corporation, and it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand if the action had been brought against the board

(14) 16 East 6.
(15) 1 Ad. & E. 526; s. c. 3 Law J. Rep. (N.S.) K. B. 165.
(16) 2 Dowl. N. S. 113.

and judgment obtained against them they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by sections 20 and 21 and others.

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*.

If the board by resolution or otherwise had accepted a bill of exchange, directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could recover the amount against them. It would have been void upon the face of it; and it is immaterial to consider whether the individuals who had written or authorised the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. If such an act was to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorised by them; and the decisions above cited would be contrary to law. Two cases only have been cited which seem to bear upon this question against the defendants, but the first, *Poulton* v. *The London and South Western Railway Company* (7) merely shews that there is no implied authority by a railway company to their servants to do an illegal act. But here no question arises upon an implied authority; for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand, in the *Dulwich College Case* (*Taylor* v. *Dulwich Hospital*) (5), the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was *ultra vires* and not binding on the corporate body; and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which being *ultra vires* was absolutely void.

The remaining question is whether Wickett, the surveyor, is liable to this action. The general rule no doubt is that one who does an unlawful act cannot justify himself by pleading the authority or direction of another. But here the surveyor is a public officer charged with the performance of various public

duties, and bound by the express words of an Act of Parliament to obey the orders of the highway board; the board themselves being a public body incorporated for public purposes and having public duties to perform, and who in ordering their surveyor to remove the obstruction in question have acted *bona fide*, and within the general scope of their duties and authority under the Act of Parliament.

To determine this question we must first consider the provisions of the Act. By section 17, "The highway board shall maintain in good repair the highways within their district." And it "shall be the duty of the district surveyor to submit to the board an estimate of the expenses likely to be incurred during the ensuing year for maintaining and keeping in repair the highways in each parish within the district." And by section 16, "The district surveyor shall act as the agent of the board in carrying into effect all the duties by this Act required to be carried into effect or to be performed by the board; and he shall in all respects conform to the orders of the board in the execution of his duties. And the assistant surveyor, if any, shall perform such duties as the board may require under the direction of the district surveyor." And then there are further provisions already referred to, enabling the board to obtain funds for the performance of their duties and the carrying of the Act into execution.

Now where all the public highways in any district are well known and ascertained, no difficulty can arise in the execution of the Act. The surveyor inspects them, and observes their condition, he makes his estimate of the expense of repairing and keeping them in repair during the ensuing year, and delivers it to the board, who thereupon direct him to effect the repairs from time to time accordingly, and he obeys their directions. But where, as here, he finds a highway which requires or will shortly require to be repaired, but the owner of the land gives him notice that the land is his private property and is no highway at all; what is the course to be pursued? We may suppose that upon his report an order has been given to him to repair the highway, and when he proceeds to do so, he finds a locked gate thrown across it, and he makes a report to that effect to the board. They, the board, after communicating with the owner of the land, and finding that the question is raised and must be determined—highway or no highway—must next consider how this may most conveniently be done. They may indict the landowner for the obstruction, or they may do as they have done here. They may give him notice to remove the obstruction, and in default of his

doing so, that they will remove it themselves, and that he may try the question by bringing an action of trespass against them. They accordingly come to the resolution they have made, and they give the order in question to the surveyor, and he in obedience to it removes the locks. If an action be then brought against the board, they plead the highway, or defend under the general issue by statute, and the question is settled by the verdict of a jury, and no difficulty arises. But if the law be that the landowner may select the surveyor as a defendant, in what condition is he placed? The board have ordered him to effect the necessary repairs, and for that purpose to remove the obstruction. He looks to the statute, and he finds that its language is imperative—"He shall in all respects conform to the orders of the board," and "act as the agent of the board" in carrying the Act into effect.

He has no means of ascertaining beforehand, or without the verdict of a jury, whether there is a highway or not, nor have the board themselves; he must therefore at the risk of absolute ruin obey the order as required by the Act, or he must refuse obedience; in other words he must disobey the order whenever a highway is in dispute. The board cannot themselves in their own persons remove the obstruction any more than they can repair the highway. They must, therefore, either instruct their surveyor to act on their behalf, or resort to some other mode, as by indictment, of raising the question, and if a public highway be established, perform their duty by putting it into repair.

I am not aware of any direct authority in reference to this Act of Parliament. But there are cases which establish a principle within which I think this case may be well decided.

In *Buron* v. *Denman* (17), it was held by Parke, B., after consulting the other Judges of the Exchequer, that where a naval officer had committed a series of trespasses for which he was personally liable to an action for damages, but the Crown had afterwards ratified his acts, the ratification was equivalent to a prior command, and the action against him could not be maintained. Baron Parke himself had some doubts whether the ratification had that effect, but the Judges, including Baron Parke, were unanimous that the defendant whose duty it was to obey the commands of the Crown could not be made personally responsible in an action for the acts done in obedience to such command. In *Andrews* v. *Marris and Witham* (1), the clerk of the Court

(17) 2 Exch. Rep. 167.

of Requests whose duty it was to issue warrants or writs of execution at the orders of the Commissioners having mistaken the effect of an order, issued a precept without authority under which the plaintiff was taken in execution, and he was held liable in trespass accordingly. But it was also held that Witham, the other defendant, one of the serjeants of the Court, and to whom the warrant was directed, and who actually made the arrest, was not liable to the action on the ground "that he was a ministerial officer of the commissioners bound to execute their warrants and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not." It was further observed by the Court, that there would be something very unreasonable in the law, if it placed him in the position of being punishable by the Court for disobedience, and at the same time suable by the party for obedience to the warrant, and that "as the subject matter of this suit was within the general jurisdiction of the commissioners, and the warrant appeared to have been regularly issued," the defendant Witham was not liable. It appears to me that in this case the surveyor was in the exact position of Witham in the case cited.

Dews v. *Riley* (2), was a similar case. There a void order of commitment had been made by a County Court under which the clerk of the Court made out a warrant of commitment, and the plaintiff was arrested by a bailiff under that warrant. It was held that the action was not maintainable, and the Court observed that "the clerk was a mere ministerial officer to carry into effect the order of the Judge, and cannot be liable in trespass for the mere performance of the duty cast upon him by the express language of the Act of Parliament."

And in *Keane* v. *Reynolds* (8), where trespass was brought for pulling down a cottage, which three magistrates had adjudged to be an encroachment within fifteen feet of the centre of a highway, and convicted the plaintiff of having made the encroachment, and the defendant, who was surveyor of the highways, had pulled down the cottage in the supposed execution of the Act 5 & 6 Will. 4, chapter 50, it appeared that the conviction was void, the way never having been repaired with stones or otherwise. But the Court held that the defendant was not liable to the action," on the principle that the surveyor acted in obedience to the judgment of a Court of competent jurisdiction, which he was bound to execute."

It is true that in most of these cases the defendants who were held irresponsible were bailiffs or other officers acting in obedience

or supposed obedience to the order of a Court or some legal tribunal made in the course of the administration of justice. But here also, as in all these cases, the surveyor is a mere ministerial officer bound by the express words of an Act of Parliament to obey the orders of the board, and having no means of knowing or ascertaining whether such orders were valid and lawful or otherwise; and the board itself is a public body, having public duties to perform, and created and incorporated for public purposes. I know not, therefore, why this officer should not be protected by law as well as the subordinate officers of a Court of justice.

It appears to me, therefore, upon the whole case, that the defendants have acted throughout strictly within the scope of their authority and their duty. A complaint is made to the board that a highway is unlawfully obstructed. Upon investigating the case, they find that an obstruction exists, but that it is disputed whether the spot is a public highway or not. Upon further inquiry, they are advised and believe that it is a highway, and, therefore, that it is their duty to keep it in repair and free from obstructions. There are two modes in which this question, whether a public highway or not, may be raised and determined—by indictment and by action. They think, and I may venture to add, I think also, that an action is preferable to an indictment, inasmuch as in a civil action points may be reserved, a motion made for a new trial, and appeals facilitated. They determine to try the question in that form accordingly. They give notice to the parties interested to remove the obstruction, and as it is still persisted in, and the opposite parties are resolved to try the question, they hold a meeting and make the order in question, and it is executed; and we are now called upon to decide whether this action in which a controversy between the board, on behalf of the public, and the owner of the land is to be settled, may be brought against individuals who have acted, as they believe, in the strict performance of their duty, in holding and attending a meeting, and resolving in their corporate character that the necessary steps shall be taken, and who may possess no funds or means to meet the expenses of the suit, or to pay damages or costs, or against the board who are charged with the duties and entrusted with the powers and provided with the funds necessary to the management of the highways within the district, and to the carrying of all the purposes of the Act into execution. The question as between the surveyor and the board is of equal importance, and is open in many respects to the same consideration.

I think, therefore, and for the reasons I have assigned, that the action should have been brought against the board, and that this action is not maintainable.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

BLACKBURN, J.:—At the trial of the cause, Kelly, C.B., being of opinion that the action would not lie either against the surveyor or the individual corporators, directed a nonsuit, and the facts, as to whether the place in dispute was a highway or not, were not discussed. The majority of the Court of Exchequer, the Chief Baron still dissenting, thought that learned Judge wrong on both points, and set aside the nonsuit and ordered a new trial.

We are all of opinion that, as regards the surveyor, the nonsuit was wrong, and that the rule, therefore, for a new trial was right, and inasmuch as it was one nonsuit where the parties were altogether, and was one single entire cause, the setting aside of the nonsuit on the ground that it was improper as to one defendant, sets it aside as regards all, and consequently the judgment making the rule absolute must be affirmed. In arriving at this conclusion, we proceed upon the ground (in which we are unanimous) that the surveyor was clearly liable.

The other question, whether the corporators were liable, which has also been discussed, is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time to consider, and possibly we should not be unanimous when we had considered; and when we had decided, it would make no difference in sending the case down for trial. Instead of being an assistance, it would perhaps be an embarrassment to the learned Judge who has to try the case to have our opinion before him, and we, therefore, think it better to leave the decision of the Court of Exchequer on that question, so far as it goes, as it is. The majority of that Court have thought the corporators were liable, the minority has thought not. We leave that decision just with the authority it had before, no better and no worse. On the new trial, the facts will be ascertained, and the point may be properly reserved, and then upon the reservation, when all the facts are ascertained, the Court that has to deal with it will be much better able to do so than we should if we were to consider it now. The main question at the trial will be, whether the footway is a highway or not, and that has not yet been discussed.

I will shortly give the reasons why I think the surveyor is liable, and I believe I shall be expressing the opinion of all the Judges. If the board had authority given to them by the statute to determine whether a disputed highway was a highway, and consequently were authorized to break into a close where they supposed there was, but where there really was not, a highway, though they honestly and *bona fide* believed there was one—if there had been any such authority given to them, and if the surveyor was acting under their orders, then I should apprehend the surveyor would be protected when obeying their orders. Now section 16 of 25 & 26 Vict. chapter 61, enacts, "the district surveyor shall act as the agent of the board in carrying into effect all the works, and performing all the duties by this Act required to be carried into effect or to be performed by the board." If the board had authority given to them to enter into a close where there was no highway, but where they really believed there was a highway, and they directed their surveyor to go there, that would be a duty in which the surveyor would be directed to act, but then the section goes on, "and he shall in all respects conform to the orders of the board in the execution of his duties." If the statute said to a man, "You are to obey the orders" of a particular person, it would be very hard to punish the man if he did not obey those orders, and at the same time to make him liable if he did obey them. But the board must have some power or duty to do the act, and the surveyor who is to do it for them is to obey their directions. The statute does not say that when the board think they have an authority, but have not, the surveyor is to act on their directions, and so acting is to be protected.

Now as to the question whether there is any jurisdiction or authority given to the old surveyor (18), and the highway board substituted for him, to break into a close which is private property where they think there is a highway, one is somewhat embarrassed by not knowing on what ground they believed this to be a highway. No board can decide whether a certain way is a highway, but they may if they like, or anybody may who likes, raise the issue at common law, and have it decided by a Court of law. There are provisions in this statute where the question whether a certain place is a highway may be brought before justices to decide whether it is a highway, but there is no power for any board or any one else to decide that. Any one acting on such a decision does it at his peril. Mr. Kingdon endeavoured to point out some section that gave that power. I can see none. Mr.

(18) The surveyor under 5 & 6 Wm. 4, c. 50.

Charles argued that if it had been a highway, the surveyor had no right to remove the obstruction. How that would be, I do not say. That is not the question here. We must, in favour of the plaintiff, assume that if he had not been stopped he would have proved that this was not a highway. And if he had proved that, the question whether the surveyor would have the right to remove an obstruction across a real highway would not have arisen. Here they broke through a gate on a footway, which has not been proved to be a highway, and there is no clause in the Act of Parliament which says they can do that. It does not give them a right to remove something from that which is not a highway, but which they think is a highway. If that be so, the ground on which the Chief Baron held the surveyor would not be responsible seems totally to fail. The exception is entirely that of people acting for Courts of justice; it does not apply to such a case as the one before us, where the statute only says the surveyor shall obey lawful orders. For these reasons, I think the judgment of the Court below ought to be affirmed, on the ground only that the surveyor was liable.

The rest of the Judges hearing the appeal concurred.

Tort of an Incorporated Company in Matters Arising out of Contract.

DOOLAN v. THE MIDLAND RAILWAY COMPANY.

1877, L. R. 2 A. C. 792.

THE HOUSE OF LORDS.

Contract for carriage of goods. The goods were lost in transit. Action was brought for damages. Various questions as to conditions, etc., were involved. The case is inserted here for the treatment of the question of the company's liability, it not being within its corporate functions to work steamboats.

Lord Blackburn:—* * * I may here dispose of a point on which great reliance seems to have been placed by the pleaders and by some of the Judges below, though I think it was abandoned on the argument at your Lordships' Bar. The Midland Railway Company is not authorized by any Act of Parliament to

own or work steamboats, and, therefore, it is said, that this company, if owning and working steamboats, would be doing so illegally, and, therefore, would be free from the restrictions imposed, it is said, only on those railway companies legally owning and working steamers. It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the Act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway could not set up its own wrong, against a plaintiff who contracted with the company in innocence and ignorance. Doolan and the Midland Railway Company are not *in pari delicto*. Doolan might perhaps set up against the Midland Railway Company that it was acting illegally, if it would in any way help him (which I do not think it in any way could), but it does not lie in the mouth of the railway company to set up its illegality, even if it would help it, which I do not think it would.

Crimes by Employees. Forgery of Share Certificate. Position of Company.

RUBEN ET AL. V. GREAT FINGALL CONSOLIDATED LIMITED.

L. R. 1906, A. C. 439.

THE HOUSE OF LORDS.

Appeal from a judgment of the Court of Appeal reversing the decision of Kennedy, J., in an action in which the appellants were plaintiffs, and the respondents defendants. The question was whether the respondent company was liable to the appellants for the loss occasioned to them by the fraud and forgery of the secretary.

The facts are stated by the Lord Chancellor in his judgment.

LORD LOREBURN, L.C.:—My Lords, in this case, Kennedy, J., gave judgment in favour of the plaintiffs, the present appellants, but stated that his decision was governed entirely by the authority of a previous case, and that his own opinion was in favour of the defendants, the present respondents.

The Court of Appeal (Collins, M.R., Stirling and Mathew, L.JJ.) gave judgment in favour of the defendants, and, in my opinion, they arrived at a right conclusion.

The question arises out of the fraud and forgery of a man named Rowe. Rowe was secretary of the defendant company. He applied to the plaintiffs, who are stockbrokers, to procure for him a loan of £20,000, in order to enable him to purchase 5,000 shares in the defendant company. Accordingly, the plaintiffs arranged with a firm of bankers to advance the money upon a transfer of the shares to the plaintiffs' names. Rowe forged a transfer in the name of one Storey as transferor. The transfer was duly executed by the bankers as transferees, and then the plaintiffs delivered it to Rowe in exchange for a certificate. The certificate purported to state that the bankers were the registered proprietors of 5,000 shares: it purported to be signed by two directors; the seal was affixed to it and it was countersigned by Rowe himself as secretary. In fact, the names of the two directors were forged by Rowe, and the company's seal was affixed by Rowe fraudulently, and not for or on behalf of or for the benefit of the defendant company, but solely for himself and for his own private purposes and advantage. Upon this, the bankers advanced £20,000. When the fraud was discovered, the plaintiffs were obliged to repay to the bank the sum of £20,000, and brought this action against the defendant company upon the ground that they were liable for the fraud of Rowe. The action was for damages for refusing to register the plaintiffs as owners of the shares.

The only other circumstance needing notice is that Rowe was admittedly a proper person to deliver certificates on behalf of the company.

I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

Another ground was pressed upon us, namely, that this certificate was delivered by Rowe in the course of his employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was held out as

having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates. Nor am I able to see how the defendant company is estopped from disputing the genuineness of this certificate. That, indeed, is only another way of stating the same contention. From beginning to end, the company itself and its officers, with the exception of the secretary, had nothing to do either with the preparation or issue of the document.

No precedent has been quoted in support of the plaintiffs' contention, except the case of *Shaw* v. *Port Philip Gold Mining Co.* (1). I agree with Stirling, L.J., in regarding that decision as one that may possibly be upheld upon the supposition that the secretary there was, in fact, held out as having authority to warrant the genuineness of a certificate. If that be not so, then, in my opinion, the decision cannot be sustained.

For these reasons, the judgment of the Court of Appeal ought, in my view, to be affirmed.

Lord Macnaghten:—My Lords, this case was argued at some length and with much ingenuity by the learned counsel for the appellants. In my opinion, there is nothing in it.

Ruben and Ladenburg are the victims of a wicked fraud. No fault has been found with their conduct. But their claim against the respondent company is, I think, simply absurd.

The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so.

(1) 13 Q. B. D. 103.

Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation, there can be no estoppel.

The fact that this fraudulent certificate was concocted in the company's office and was uttered and sent forth by its author from the place of its origin cannot give it an efficacy which it does not intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company.

I could have understood a claim on the part of the appellants if it were incumbent on the company to lock up their seal and guard it as a dangerous beast and if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it has been disposed of for good and all by the case of *Bank of Ireland* v. *Trustees of Evans' Charities* (2) in this House.

Of all the numerous cases that were cited in the opening none, I think, is to the point but *Shaw* v. *Port Philip Gold Mining Co.* (1), and that, as it seems to me, cannot be supported unless a forced and unreasonable construction be placed on the admissions which were made by the parties in that action.

I think the appeal must be dismissed with costs.

Lord Davey:—My Lords, to use the language of a distinguished Judge of the last generation, the appellants' case seems to me as full of holes as a colander. There is not a step in their title which is not tainted with fraud going to the root of it. Storey, whose name was used as transferor, had not 5,000 shares to transfer, and his name was forged to the transfer. There were, therefore, no shares, and there was no transfer. The seal on the certificate was, indeed, a genuine impression of the company's seal, but it was placed there without any authority, and (as concisely stated by Lord Lindley, in his work on Companies, 6th ed., p. 246) "A document of that kind, if there is any intent to defraud, is a forged instrument." The signatures of the two directors who purported to countersign were also forgeries.

The appellants have no doubt been grossly defrauded, but the question is whether they can shift the loss on to the shoulders

(2) 5 H. L. C. 389. (3) 13 Q. B. D. 103.

of the innocent. The company has done literally nothing in the transaction, and could do nothing, because in no stage of the transaction did it come before the board of directors, which alone was entitled to speak and act for it. It is admitted that Rowe was the proper person to deliver certificates to those entitled to them. From this harmless proposition, the appellants slide into another and a very different one, that it was the secretary's duty to warrant, on behalf of the company, the genuineness of the documents he delivered. There is no evidence that any such duty or power was, in fact, entrusted to Rowe, and it is too great a strain on my powers to ask me to imply it from the mere fact of his being the secretary or the proper person to deliver documents.

But, even if I could make the implication that the appellants desire, I do not think it would assist them, for I agree with the learned Judges in the Court of Appeal that every part of the legal proposition stated by Willes, J., in his well-known judgment in *Barwick* v. *English Joint Stock Bank* (4) is of the essence of it. Willes, J.'s, words are these: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." Where, therefore (as in the present case), the secretary is acting fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers. And, in my opinion, it would be a matter of reproach if the law were otherwise. The reason for the qualification is that a representation made under such circumstances, whether express or implied, is also part of the same fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master.

Finally, it is, in my opinion, open to serious doubt whether on the facts of the present case the parties relied on Rowe's representation at all. The evidence indicates that they refused to do so, because they declined to part with their money on Rowe's certifying the transfer (as it is called), and if they acted in reliance on the certificate apart from any representation, their case, of course, fails, for nobody can pretend that the certificate itself created any estoppel against the company.

I guard myself from expressing any opinion whether, even if the certificate had been genuine, but issued under some innocent mistake, it would have been an estoppel in favour of the present appellants. It will be remembered that the appellants themselves

(4) L. R. 2 Ex. 259, at p. 265.

propounded the forged transfer to the company for registration of the supposed transferees' names. I share the doubt expressed by my noble and learned friend, Lord Macnaghten, in *Balkis Consolidated Co.* v. *Tomkinson* (5) "whether under such circumstances a person ought to be permitted to rely upon a representation innocently made to which he has in a sense and to a certain extent contributed." The recent decision of this House in *Mayor of Sheffield* v. *Barclay* (6) may be found to have some bearing upon this point. It is, however, unnecessary to express any opinion upon it on the present occasion.

I am of opinion that the appeal should be dismissed.

LORD JAMES OF HEREFORD:—My Lords, concurring as I do entirely in the judgments that have been delivered by my noble and learned friends, I do not propose to add to them, except to make one observation. This is one of the cases in which it is said that one of two innocent persons must suffer. I cannot help observing that the decision now about to be given may cause those who receive certificates in commercial life to be anxious and to be shaken in their confidence in respect of the validity of those certificates. But in this case, the transferee has a safeguard which a company has not. A company cannot protect itself against the frauds of its secretary, and if the company has to bear the burden of the loss, of course, the loss placed upon companies will be very great, and they must guard against it, but certainly theoretically—I do not know whether it is quite the case practically—the transferee has a safeguard, he can always apply to the two directors whose names appear on the certificate and inquire from them whether those signatures are valid and genuine signatures or not. If the answer is that they are genuine, the certificate, of course, is valid; if the answer is, "No, I have not signed that certificate," then he is aware that it is invalid. I do not know whether in commercial life transferees will take the trouble to inquire of directors whose signatures appear on certificates whether those signatures are genuine or not, but at any rate there is that power if they choose to exercise it.

LORD ROBERTSON and LORD ATKINSON concurred.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

NOTE.—See *McKenzie* v. *Monarch Life*, 45 S. C. 232.

(5) [1893] A. C. 396, at p. 411. (6) [1905] A. C. 392.

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